UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARQUEZ BROTHERS ENTERPRISES, INC. **AND** **ALFONSO MARES** **AND** **JAVIER AVILA**	**NLRB Case Nos.: 21-CA-039581** **21-CA-039609**

RESPONDENT'S POST HEARING BRIEF

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Respondent Marquez Brothers Enterprises, Inc. ("Respondent") hereby submits the following Post Hearing Brief.

I. INTRODUCTION.

This is a backpay proceeding involving Claimants Alfonso Mares ("Mares") and Javier Avila ("Avila," collectively "Claimants"). The Hearing lasted seven days, beginning on August 8, 2017 and continuing to August 10th. The Hearing resumed on August 14th, 15th, and again on September 6th, when the Hearing was first closed. The Hearing reopened and adjourned on February 28, 2018.

As demonstrated in detail below, this proceeding was subject to gross misconduct by Claimants and a total failure by Compliance Officer Marene Steben ("Steben") to adequately investigate backpay. During the backpay period and during the Hearing, Claimants went to great lengths to conceal interim earnings, interim employers, and responsive documents regarding same. It cannot be disputed that over a course of six-and-one-half years, Mares and Avila failed to reasonably seek and maintain comparable interim employment. Claimants made minimal efforts to search for interim employment, including submitting on average only 1.25 employment applications per month. In other words, Claimants failed to make any search efforts for weeks at time, each month of the backpay period. Their repeated, and ultimately successful, efforts to conceal interim earnings throughout the backpay period, combined with their failure to reasonably search for interim employment, requires the finding that backpay be denied in its entirety for Mares and Avila.

II. PROCEDURAL HISTORY.

This case stems from two Unfair Labor Practice charges each Claimant filed against Respondent. After the National Labor Relations Board ("NLRB" or "Board") issued its decision,

Respondent appealed. On January 25, 2013, the Court held the review in abeyance pending its decision in NLRB v. Noel Canning, 134 S.Ct. 2550 (2014). The Court held the case in abeyance for almost two years, until November 18, 2014, when it vacated and remanded the case. Respondent appealed the Board's decision.

On May 19, 2016 the Court issued a Judgment enforcing the Board's Order against Respondent, finding that Respondent had wrongfully discharged Mares on June 2, 2010 and Avila on December 3, 2010. Respondent sent unconditional offers of reemployment to each Claimant, requesting Claimants provide a response to Respondent no later than August 23, 2016. Tr. 846; 848; GC Ex. 2 and 10.[1] Mares never responded to Respondent's offer. Tr. 847. Avila contacted Respondent and informed Respondent he was not interested in returning to work with Respondent. Tr. 848. Consequently, the backpay period for each claimant ended on August 23, 2016.

Three months after the Court's Judgment, at the end of August 2016, the Board sent its first correspondence seeking information relating to Claimants' backpay. In early September 2016, Respondent sent two correspondences to the Board providing information and documentation to the Board. There were no further communications from the Board until February 28, 2017, when the Board issued the Compliance Specification. The Board never responded to Respondent's correspondences, requested additional information, attempted to discuss settlement, or take any other action.

A. Respondent Served Mares and Avila with Subpoenas Duces Tecum in Preparation for the Hearing.

In preparation for the Hearing, Respondent served each Claimant with subpoenas duces tecum months in advance of the Hearing. Respondent served claimant Mares' trucking company

[1] Throughout this brief, "GC Ex. ___" refers to the number(s) of Counsel for the General Counsel's Exhibits at the Hearing in the above-referenced cases; "Res. ___" refers to the number(s) of Respondent's Exhibits; "JT Ex. __" refers to the number(s) of the joint exhibits; and "Tr. __" refers to the pages of the official transcript of the Hearing.

with Subpoena Duces Tecum Numbers B-1-VTSNU5 and B-1-VTWTK5 on May 8, 2017[2]. Res. 2. On July 9, 2017, Respondent served Mares individually with a Subpoena Duces Tecum, Number B-1-WJPXPR. Res. 3. Respondent also served claimant Avila with a Subpoena Duces Tecum, Number B-1-WJQ1M1, on July 6, 2017. Res. 5. Mares had three (3) months to gather documents in response to the subpoenas served on his trucking company. Mares also had thirty (30) days to gather documents in response to the subpoena served on him individually. Similarly, Avila had thirty-three (33) days to gather documents in response to the subpoena served on him. Needless to say, Claimants had ample time to comply with, or oppose, Respondent's subpoenas duces tecum. Neither Claimant filed a petition to revoke the subpoenas or contacted Respondent's counsel for clarification.

Although not required, Respondents took additional steps to remind Claimants of their obligation to produce documents. On July 24, 2017, weeks in advance of the Hearing, Respondent served follow-up letters and the Subpoenas to each Claimant explaining, in plain language, their obligations pursuant to the subpoenas duces tecum. Res. 3 and 4. Counsel for the General Counsel ("CGC") was also sent a courtesy copy of the letters. Neither Claimant responded to the letters. However, both Claimants admitted they met with CGC to review and prepare their responses to the subpoenas. Tr. 1119; 1122; 1073-1074. Additionally, both Claimants were experienced litigants familiar with their discovery obligations and had access to counsel. Both have been or are lead plaintiffs in large, civil class actions against employers. Yet, aside from meeting with CGC, Claimants allege they chose not to use their legal counsel even though they had access to counsel.

[2] The subpoenas were addressed to the Custodian of Records and the "Person Most Knowledgeable" for Alfonso G. Mares trucking company.

On the first day of the Hearing, Mares produced only five (5) pages of documents in response to only one of Respondent's three subpoenas served on Mares. Avila did not produce any documents. After providing an opportunity to respond to Judge Lisa Thompson's ("ALJ" or "Judge Thompson") questions, the ALJ issued an Order to each Claimant, ordering them to produce any and all responsive documents the following morning. On the second day of the Hearing, both Claimants produced some documents, but still did not provide documents responsive to all of Respondent's requests.

Avila admitted meeting with CGC on how to respond to Respondent's subpoena. Tr. 1119. In fact, Avila admitted he met with CGC after receiving Respondent's subpoena prior to the start of the Hearing. Tr. 1122-1123. CGC answered Avila's questions about the subpoena. Tr. 1123. CGC described the documents Avila needed to produce in response to the subpoena. Tr. 1125. **Yet, Avila showed up to the first day of the Hearing without producing any documents**. On the second day of the Hearing, Avila produced additional documents, but again failed to fully comply. No reason was given by Avila for the failure to fully comply with the subpoena. Avila willfully concealed documents during the Hearing, refused to timely produce documents, and delayed production of key documents that were detrimental to his case.

Mares also admitted he met and consulted with CGC at the NLRB's Regional Office to prepare the letter to Respondent's counsel regarding his document production. Tr. 1073-1074; Res. 57. Even with the help of counsel, Mares lied in his response to Respondent. In the letter, Mares states he did not receive any funds or payments during the backpay period, but this is not true. Tr. 1075-1076. For instance, Mares received payments from settlements reached with employers, including Respondent. Tr. 1076-1077. In addition to responding untruthfully to Respondent's letter, Mares failed to produce all responsive documents. Furthermore, Mares

willfully concealed responsive documents from Respondent, including bank statements for the five month period during which Mares worked for a concealed interim employer. Notably, these five months were the only months of bank statements Mares did not produce.

B. The ALJ Issued Sanctions Against Avila.

Throughout the Hearing, Claimants repeatedly engaged in one-sided production and produced documents on a rolling basis, subjecting Respondent to a trial by ambush setting throughout these proceedings. Ultimately, Claimants never fully complied with Respondent's subpoenas. Due to Claimants' deceptive behavior, the ALJ issued evidentiary sanctions against Mares and Avila. The ALJ prohibited CGC from questioning witnesses about interim earnings.

CGC filed a Request for Special Permission to Appeal the ALJ's order ("Request"). While the Request was pending before the Board, Claimants, especially Avila, continued to engage in further misconduct. In fact, Avila admitted to possessing a second resume he had not produced to Respondent. Res. 53. Avila willfully concealed the resume because he had listed his position as "Salesman" with Respondent and with almost all other employers on his resume, which as described below, significantly damaged his case and credibility. Other than Avila's willful refusal to produce the document, there was no reason Avila could not have produced his resume on the first day of the Hearing. Based on Avila's ongoing, blatant misconduct, the ALJ granted further evidentiary sanctions against Avila and drew an adverse inference against Avila that he has not engaged in a reasonable effort to search for interim employment and that Avila has concealed interim earnings. The Hearing closed that day.

Thereafter, on September 7, 2017, the Board granted CGC's Request. Respondent filed a Motion for Reconsideration. The Board denied the Motion. Notwithstanding the Board's September 7th ruling, Respondent maintains sanctions are warranted against Mares and Avila. Importantly, CGC's Request and the Board's ruling only address the first two days of the Hearing,

up to August 10, 2017. However, Claimants' misconduct, especially Avila's, only worsened as the Hearing progressed. Claimants repeatedly, willfully withheld documents damaging to their case. Avila attempted to withhold key resumes, withheld all of his tax return documents except for 2014, and withheld his W-2 Forms from every year except 2014, among other things. Similarly, Mares willfully concealed bank statements only for the period he worked for a concealed interim employer and failed to produce documents relating to his trucking company, except for a photograph of a truck.

The Board did not consider any of these facts in its ruling. As such, the Board's ruling should not be relied on in support against issuing evidentiary sanctions based on Claimants' ongoing willful misconduct. As described in detail below, adverse inferences should be drawn against Claimants that they have not engaged in reasonable efforts to search for interim employment and that Claimants have concealed interim earnings.

III. SUMMARY OF ARGUMENT.

Claimants are not entitled to backpay. Claimants willfully concealed interim earnings throughout the backpay period to such an extent that is impossible to isolate during which quarters the concealment occurred. Board precedent makes clear that in such a circumstance, backpay must be denied for the backpay period. American Navigation Co., 268 NLRB 426 (1983).

As part of their ongoing concealment, Claimants failed to keep accurate records of their search efforts. Claimants recorded all their alleged efforts to search for work using the NLRB Employment and Expense Report forms ("NLRB Forms") submitted to Claimants by the Board in 2016. Tr. 494-495; 505; 591-592; 627. In 2016, Claimants filled in these forms relying solely on their memory, as they both repeatedly admitted they maintained no other form of record-keeping during the backpay period. Claimants did not keep records to more easily conceal interim

employment. In 2016, Claimants allege they could detail daily efforts from 2010 through 2016. It is not credible, especially without notes or diaries. They both made up the entries on the forms.

Moreover, Claimants failed to engage in reasonable efforts to seek and hold interim employment and CGC failed to demonstrate otherwise. Since CGC failed to meet this burden, Board precedent requires a finding that Claimants did not mitigate backpay. Gimrock Construction, 356 NLRB 529 (2011); CHM section 10558.1. CGC did not rebut Respondent's expert's testimony. Nor did CGC present convincing evidence demonstrating Claimants made reasonable efforts to search for work. On the contrary, Claimants' NLRB Forms clearly indicate the opposite is true. On average, Claimants applied for work only 1.25 times per month. This means Claimants did not look for work for numerous weeks each month. Accordingly, backpay must be denied.

Even though CGC acted as Claimants' counsel and advised them regarding Respondent's subpoenas, Claimants still refused to fully comply with the subpoenas. Claimants withheld responsive documents that were damaging to their case and did so even when the ALJ's original evidentiary sanctions were in effect. Board precedent permits the ALJ to draw an adverse inference under such blatant abuse of Board process. This is true even though Claimants partially produced documents in response to Respondent's subpoenas, especially where documents are still outstanding. Essex Valley Visiting Nurses Association, 352 NLRB 427 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

Furthermore, the Compliance Officer's investigation in this case was horrendous, failed to comply with Board procedures, and, consequently, the backpay calculations are not reasonable. The alternate formula proffered by Respondent is more accurate and should be followed instead. Laborers Local No. 35 (Betchel Power Corp.), 301 NLRB 1066, 1073 (1991). It is CGC's burden

to prove by a preponderance of the evidence that the gross backpay formula and amounts are reasonable. Performance Friction Corp., 335 NLRB 1117 (2001); CHM Section 10664.1. CGC did not meet this burden. In fact, Steben repeatedly admitted she did not follow established Board procedure to conduct her backpay investigation, including not maintaining contact with Claimants during the backpay period, gathering documents from Claimants, contacting their interim employers, and failed to verify verbal statements by Claimants, among other things. Steben further admitted that had she known about the various concealed earnings, this would have changed her backpay calculations.

Additionally, CGC did not present any evidence regarding the enforceability of the settlement agreements entered into between Respondent and Claimants. However, the overwhelming evidence established that these agreements meet the Board's Independent Stave factors and Claimants even specifically testified about their reasons and understandings of entering into the settlement agreements with Respondent. 287 NLRB 740 (1987). These settlement agreements warrant a denial of backpay.

Moreover, Claimants are not entitled to compensation for the alleged expenses they incurred during the backpay period. The mileage expenses were unreasonably calculated because they do not take into consideration any holidays, vacation, or other absences on the part of the Claimants. Further, the Board's ruling in King Scoopers, Inc., 2016 NLRB LEXIS 625 (2016), enforced, King Scoopers,Inc. v. NLRB, 2017 U.S. App. LEXIS 10260 (D.C. Cir., June 9, 2017) was wrongly decided and should be overruled.

Similarly, the Compliance Officer's calculations relating to adverse tax consequences are also unreasonable and thus should be denied. Additionally, backpay and interest must be tolled during the period wherein the United States Court of Appeals for the District of Columbia issued

an independent stay of the entire case and for the Board's unreasonable and excessive delay in initiating the backpay proceedings. The principles set forth in NLRB v. Rutter-Tex Mfg. Co., 396 U.S. 258 (1969) are inapplicable to the present situation and warrant that interest be tolled.

Nor should interest be calculated on a compound basis. The Board's decision in Jackson Hospital Corporation d/b/a Kentucky River Medical Center, 356 NLRB 6 (2010) was wrongly decided because it wrongly penalizes respondents for the sometimes protracted NLRB proceedings and the Act is not a penal statute. Windfall remedies, including compound interest, are penal. Starcon Int'l v. NLRB, 450 F.3d 276, 277-78 (7th Cir. 2006) (Posner, J.) enforcing Starcon, Inc., 344 NLRB 1022 (2005). Rather, interest calculations should be reviewed on a case-by-case basis, as the Federal courts do with respect to both the award of prejudgment interest and how it is calculated in employment cases.

Furthermore, CGC had the burden to prove and quantify the extent of any adverse tax consequences. Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10 (2014). However, because the backpay calculations indicated are unreasonable, and CGC failed to demonstrate otherwise, the more accurate formula proposed by Respondent must be followed instead. As demonstrated by Respondent's calculations, Mares and Avila are not entitled to any adverse tax consequences.

Additionally, Respondent respectfully requests the ALJ to order Claimants to pay its legal fees relating to the delays caused by Claimants' willful refusal to fully comply with Respondent's subpoenas and their extreme abuses of Board process. 675 W. End Owners Corp., 345 NLRB 324 (2005). Claimants repeatedly and willfully withheld damaging documents, lied about their production, and did so while being advised by CGC on how to respond to Respondent's subpoenas.

Claimants' engaged in bad-faith conduct regarding Respondent's subpoenas throughout the course of these proceedings.

For the foregoing reasons, and those described in detail below, backpay must be denied.

IV. STATEMENT OF FACTS.

A. Claimants Concealed Interim Earnings.

Throughout the Hearing, it became abundantly clear Claimants worked for interim employers about which they did not inform the Compliance Officer or the Board. Claimants went to great lengths during the Hearing to conceal that they obtained interim earnings during the backpay period that were never reported to the Board.

1. Mares Indicated on Multiple Resumes He Worked for Nature's Own, but Never Produced Documents to the Board or Respondent.

On multiple resumes, Mares listed that he worked for Nature's Own, but never produced any documents to the Board or Respondent indicating his earnings from Nature's Own. Mares specifically listed on at least two resumes that he worked for an employer named Nature's Own. Res. 10 and 22. Mares began working at Pacific Foods & Distribution ("Pacific Foods") in January 2011. GC Ex. 6. Mares admitted he submitted his resume to Pacific Foods when he applied there. In his resume, Mares lists his employment with Nature's Own:

> As of now I'm working at **natures own** [*sic*] bread as a delivery driver doing the same thing as I did before with my other jobs I been [*sic*] in this job for 5 months . . .

Res. 10; emphasis in original. Thus, Mares worked for Nature's Own beginning in about August 2010 until about January 2011, when he began his employment with Pacific Foods.

Yet, Mares denies he worked at Nature's Own. Tr. 457. **Importantly, during the Hearing, Mares produced his bank statements for every month during the backpay period except for the time period he worked for Nature's Own.** Mares did not produce bank statements

for August 2010 to November 2010. This was intentional. Mares even admitted he never produced these bank statements to Respondent. Tr. 1052.

Additionally, Mares prepared a second resume after he was working at Pacific Foods. Res. 22. In this second resume, Mares continues to list his employment with Nature's Own and specifically states he worked there for five months:

> I work [*sic*] at **natures own** [*sic*] bread as a delivery driver doing the same thing as I did before with my other jobs I been [*sic*] in this job for 5 months, I fix and put bread on their shelf's [*sic*] check out of code items and also see if there is any sell items.

Res. 22. The second resume has been updated to include the job duties he held with Nature's Own.

Clearly, the resumes specifically state the amount of time Mares worked for Nature's Own: five months. Res. 10 and 22. The dates of that employment align with the time lapse between the end of his employment at Respondent and the commencement of his employment with Pacific Foods. However, Mares contends he never worked at Nature's Own. Tr. 457. Mares alleges he did this to show that he had more experience. Tr. 457. Mares' assertion defies belief. His resume explicitly states he has "21 years of experience." Res. 10 and 22. An additional 5 months of experience therefore would be insignificant and obviously would not increase or benefit his chance of employment. Further, it makes no sense that Mares would lie on his resume by indicating a new employer. If Mares intended to be dishonest in his resume, he likely would have asserted he was still employed by Respondent rather than list a new employer, who could instantly reveal Mares' deception.

Notably, Mares' reasons for listing Nature's Own on his resume are disingenuous because he continued to list Nature's Own on his resume even after he obtained employment with Pacific Foods. In fact, Mares added extra details about his employment with Nature's Own, specifying the job duties he held there. Res. 22. If, as Mares alleges, Nature's Own was falsely listed on his

resume solely to increase his chances of employment, then once he obtained employment with Pacific Foods he would have removed Nature's Own from his resume. The need to lie would have no longer existed but the risk of discovery would have continued to exist as long as the allegedly false resume entry existed. However, Mares did not remove the entry and continued to list Nature's Own on his resume. Res. 22. Undoubtedly, this is because Mares did in fact work at Nature's Own. Further, Mares admitted he discussed his employment at Nature's Own during his interview with Pacific Foods. Tr. 500. However, Mares never reported his employment with Nature's Own to the Board and never produced any records of the monies he earned while employed at Nature's Own. For this same reason, Respondent is unaware how Mares' relationship with Nature's Own ended. That is, whether the relationship ended because Mares unreasonably quit working at Nature's Own or if it was because he was terminated.

2. <u>Mares Failed to Report His Earnings from Operating His Trucking Company</u>.

Mares failed to report his earnings from a trucking company he operated. At first, Mares denied ever having a trucking company. Tr. 413; 471. Later, he admitted he had a trucking company. Tr. 506. Mares had even applied to the United States Department of Transportation to obtain a registered DOT number for his trucking company. Tr. 507. The business name, address and DOT number for Mares' trucking company are accurately listed on the webpage "Quick Transport Solutions, Inc." Tr. 507-508; GC Ex. 19. Mares admitted he never discussed his trucking company with the NLRB during the backpay period, nor produced any records regarding his trucking company to the Board. Tr. 509.

3. <u>Mares Concealed Earnings He Obtained from a Tenant</u>.

Additionally, Mares failed to report earnings he received from monthly residential rental payments. Mares testified he received $400 each month from a tenant in his residence. Tr. 1032-

1033. Mares never reported this amount to the NLRB and it is not included in the Compliance Specification. Mares asserted he received these payments throughout the backpay period. Tr. 1033. Had this amount been included in the backpay period, it would have amounted to additional income for Mares of $29,880 (74.7 months x $400).

4. Avila Never Produced His Tax Returns, and Instead Produced Only a Cursory Social Security Earnings Record Summary to Avoid Revealing Detailed Information About His Sources of Income.

Avila did not produce to the Compliance Officer any tax returns, or any other documents, indicating his sources of income. Instead, Avila produced only a one-page Social Security Earnings record summary ("Social Security form"). Avila chose to produce this limited document to conceal the sources of his income. The Compliance Officer testified that she calculated Avila's interim earnings by relying on a Social Security form Avila provided to her and on the NLRB Forms Avila submitted. Avila did not submit to Steben any other documentation regarding his earnings during the backpay period. Tr. 169; 204; 206; GC Ex. 13. As discussed below, the Social Security form Avila submitted only shows taxable wages reported, does not accurately reflect his income, and reports lower earnings than those listed in the United States Internal Revenue Service ("IRS Printouts") documents produced at the Hearing. In fact, the Social Security form listed Avila's income as less than it actually was four out of the six backpay years:

Year	**Social Security Form** (Given to Compliance Officer to Calculate Backpay)	**IRS Printout** (Produced Subject to Respondent's Subpoena)
2010	$42,141	$43,911
2011	**$0**	**$24,300**
2012	**$20,151**	**$30,405**
2015	$6,197	$11,454

As seen above, in 2011, Avila's Social Security form indicated his income was $0. However, the detailed IRS printout listed over $24,000. Similarly, in 2012, Avila's Social Security form indicates he earned a little over $20,000. However, the IRS Printout shows Avila earned over $30,400. **In sum, the IRS Printout demonstrated that Avila earned $41,581 more than indicated on the Social Security Form.** GC Ex. 13; Res. 62.

Furthermore, the Social Security form only lists the total wages; it does not indicate the source of the wages. Nonetheless, the Compliance Officer relied only on the Social Security form and Avila's own, self-serving verbal statements to her to calculate the Compliance Specification. As demonstrated above, Avila under-reported over $41,000 at a minimum. This amount does not include any money Avila received in cash or "off the books." Based on the above, it quickly becomes apparent why Avila chose to report his interim earnings verbally to the Compliance Officer.

5. Avila Concealed from the Board Earnings from Three Separate Interim Employers.

In addition to the more than $41,000 unaccounted for, Avila concealed interim earnings from three separate interim employers that occurred during the backpay period. Avila never reported his earnings received when he worked at Macy's as a Sales Representative, nor his earnings received as a promoter for the band El Conjunto Rebelde, nor his earnings received when he worked for his father at Avila's Pressure Washer. Clearly, had Avila reported these earnings to the Board, the Compliance Specification and Avila's alleged backpay amount would have been significantly less. Since Avila concealed interim earnings, he is not entitled to receive any backpay.

a) Avila Did Not Report His Earnings From Employment With Macy's.

Similarly, Avila concealed his earnings from a sales job with Macy's. Avila worked as a Sales Associate at Macy's for one month in or about November 2014. Tr. 564; 566. It was not until after the Compliance Specification had been issued that Avila admitted to the NLRB he had worked at Macy's. Tr. 619-620. Avila had never provided the Compliance Officer with any documentation relating to his work at Macy's. Tr. 620.

b) Avila Did Not Report His Earnings as a Promoter for the Band El Conjunto Rebelde.

Avila never reported his earnings as a promoter for the band El Conjunto Rebelde. On his MySpace page, Avila indicated he worked as the band's promoter. Tr. 648; Res. 19(a). He indicated he earned $60,000 to $75,000 as its promoter. Tr. 648. While Avila denies he was the band's promoter and alleges he could have listed any number on his MySpace homepage as his income, he specifically chose this range. Tr. 648. Even if Avila was possibly inflating his income to present himself (and the band) as more successful than they were, his actions and efforts make it reasonable and likely that he did serve as that band's promoter and did earn interim income from it that he did not report to the NLRB.

c) Avila Did Not Report His Earnings From Avila's Pressure Washer.

Avila also never reported to the NLRB that he worked at his father's business, Avila's Mobile Pressure Washer. Tr. 572; 625. Avila alleges he began working for his father in 2005 and ceased employment there in 2017. Avila alleges he only worked for his father one day in 2017, but admitted he generally worked for his father about three times per year. Tr. 572-573. Avila alleges he earned $50 each time he worked with his father. Tr. 625. However, he never reported to the NLRB that he ever worked for his father. Avila never reported to the NLRB any earnings

from any days that he worked for his father during the backpay period, and he did not indicate in the NLRB Forms that he worked for his father. Tr. 627.

6. Claimants Failed to Report to the NLRB Repeated Cash Deposits Made into Their Bank Accounts.

Claimants concealed cash deposits they received during the backpay period. Both Claimants made repeated cash deposits into their personal banking accounts. However, Claimants never reported the cash deposits to the NLRB at any point during the backpay period, nor when the Compliance Specification was prepared. Mares did not provide the NLRB with his bank statements or any other information related to the cash deposits he received during the backpay period. Mares admitted he only submitted his W-2 Forms. Tr. 520-521; Res. 25. Similarly, Avila did not provide his bank statements to the NLRB. Tr. 650; Res. 34. Avila provided no information to the NLRB regarding cash payments he received during the backpay period. Tr. 649-650.

For the majority of the deposits, Claimants alleged they could not recall the source of the deposits. For instance, Mares could not account for deposits made on February 7, 2011, for $1,090.58, or on March 12, 2015, for $3,600. Tr. 527-528; Res. 25. Avila could not account for cash payments received on September 3, 2013, for $1,597; on September 16, 2013, for $140; or on March 31, 2014, for $200. Tr. 649-650; 652; Res. 34. While Avila tried to allege that the incentive program at AT&T was the source of some of these deposits (*e.g.*, on February 24, 2014, for $120, and on February 28, 2014, for $340), he stated he was not certain, and qualified his depiction of these deposits as "probably" coming from AT&T. Tr. 1088. Avila also received multiple large cash deposits in August 2013, such as one for $2,400 and another for $865.78. Res. 34. However, again Avila could not remember the source of these deposits and whether they were from an interim employer. Tr. 654. This was true for still other large cash deposits of his. Tr.

654; Res. 34. None of these cash deposits were reported to the NLRB. Tr. 654. Nor were these amounts incorporated into the Compliance Specification.

7. Claimants Attempted to Conceal Interim Earnings During the Proceeding By Refusing to Fully Comply With Respondent's Subpoenas.

As discussed in detail in Sections IV.H and IV.I., Claimants repeatedly attempted to conceal interim earnings and employers during the proceeding by refusing to fully comply with Respondent's subpoenas. Neither Claimant is new to litigation and the discovery process. Both have been or are lead plaintiffs in large, civil class actions against employers.

Avila was lead plaintiff in a large, complex class action lawsuit brought against Respondent in Javier Avila v. Marquez Brothers Enterprises, Inc., case number BC535204, available online at http://www.lacourt.org/casesummary/ui/index.aspx?casetype=civil. Avila was represented by Farzad Rastegar of Rastegar & Matern in this action. As lead plaintiff, Avila had his deposition taken. See Res. Ex. 28, 30 and 32. The lawsuit lasted almost three years, from November 19, 2013 until August 17, 2016, when Avila entered into a settlement agreement with Respondent. Throughout the proceedings, Avila was represented by counsel, including at his deposition and in negotiating a settlement agreement with Respondent. Avila, through his counsel, negotiated a separate settlement agreement to resolve all his claims against Respondent, aside from the global settlement reached between Respondent and the class members. Thus, while this case settled last year, Avila is arguably at least familiar with his discovery obligations. Further, while Mr. Rastegar is not representing Avila in these proceedings, Avila at least had access to counsel, but chose not to use counsel.

Similarly, Mares is currently a lead plaintiff in a separate large and complex class action lawsuit, Alfonso Mares v. Pacific Foods & Distribution, Inc., case number 30-2017-00899553-CU-OE-CJC, available online at http://www.occourts.org/online-services/case-access/. Mares is

also represented by Mr. Rastegar of Rastegar Law Group, APC in this action. Thus, Mares currently has access to counsel, but chose not to use counsel. Mares also had legal counsel throughout his workers' compensation case, which he again chose not to consult with. Further, as with Avila, Mares is at least familiar with his discovery obligations as a lead plaintiff in a much more complex setting.

Moreover, Claimants both admitted to meeting CGC in her offices for guidance on how to respond to Respondent's subpoenas. Mares admitted that he met and consulted with CGC at the NLRB's Regional Office to prepare a letter to Respondent's counsel regarding his document production. Tr. 1073-1074; Res. 57. Avila also admitted to meeting with CGC to respond to Respondent's subpoena, before and during the Hearing. Tr. 1119; 1122-1123. Thus, contrary to Claimants' assertions, Claimants had access to and used counsel.

In addition to understanding their discovery obligations, there were no other barriers preventing Claimants from contacting Respondent's counsel with questions or concerns regarding the subpoenas. Avila speaks fluent English and could easily have called or emailed Respondent's counsel. He did neither. Throughout the Hearing, Mares stated he relied on his wife for translation purposes, including preparing his resume and job applications. Tr. 418-419; 424-425. Even CGC represented Mares' wife could translate for him during the Hearing. Tr. 13. There is no reason Mares' wife could not contact Respondent's counsel with questions or concerns. Also, Ms. St. Pierre is fluent in Spanish and could have spoken with Mares directly if he preferred. Nonetheless, both Claimants followed CGC's instruction not to answer Respondent's questions, and never contacted Respondent about the subpoenas. This is true even after the ALJ instructed Claimants to contact Respondent with any issues. Tr. 33.

B. Claimants Failed to Adequately Search for Interim Employment.

Claimants failed to adequately search for interim employment. As demonstrated by the NLRB Forms filled out by Claimants, the Compliance Officer's own testimony, Claimants' testimony and Respondent's expert witness, it is irrefutable that Claimants did not meet even the minimum standards to search for interim employment.

1. As Demonstrated by Respondent's Expert, Comparable Work Was Readably Available to Claimants.

June Hagen, Ph.D., Respondent's expert witness, described at length the numerous comparable positions available in the region Claimants worked. Ms. Hagen explained how, if Claimants had engaged in a reasonable search, they would have found comparable work within five months from the end of their employment with Respondent.

As a preliminary matter, Ms. Hagen is a qualified vocational expert. She has been taking both formal and informal courses in the field of vocational rehabilitation for 31 years. Tr. 770. She also is certified by the American Board of Vocational Experts and is a Certified Disability Management Specialist. Tr. 770; Res. 43. Ms. Hagen has served as a vocational expert since 1996. Tr. 770; Res. 43. She has testified in many agency and court proceedings. Tr. 771; Res. 44. In sum, Ms. Hagen is absolutely qualified to present her expert opinion on Claimants' alleged efforts to search for interim employment.

a) Ms. Hagen Reviewed Claimants' Job Duties and Payroll Information to Assess Comparable Job Positions.

As part of her analysis, Ms. Hagen reviewed Claimants' job duties and payroll records to assess comparable job positions. Tr. 773-774. Ms. Hagen then reviewed Bureau of Labor Statistics salaries and Employment Development Department job salaries to determine the number of jobs for sales route drivers and the salary range from late 2010 to 2016 in Los Angeles County, Orange County, and the Inland Empire, including San Bernardino and Riverside. Tr. 774-775;

Res. 47 and 49. Ms. Hagen chose these particular counties since Claimants worked in and lived near them. Tr. 776. As demonstrated by Ms. Hagen's analysis, there were over 9,000 sales route driver jobs in 2011 in Los Angeles County. Res. 47. There were almost 11,000 jobs in 2012 in Los Angeles County. Res. 47.

b) Ms. Hagen Contacted Multiple Employers to Assess the Availability of Job Positions for Sales Route Drivers and the Hiring Practices of Employers in Claimants' Area.

Ms. Hagen conducted a detailed local labor analysis, focusing specifically on the area Claimants were located in and their specific job position. Ms. Hagen did not solely rely on generalized statistics in her analysis or in her final opinion. Ms. Hagen looked for job openings for a sales route driver, and contacted a sampling of employers during 2016 to inquire about qualifications, salary, and hiring frequency for this position. Tr. 781. Ms. Hagen asked employers' human resources department or corporate offices how often they hired for this position during the backpay period, from 2010 to 2016. Tr. 782. Ms. Hagen also reviewed internet ads in a search for such job openings. Tr. 782. This is the same procedure Ms. Hagen has employed for the past 31 years to conduct labor market surveys for vocational rehabilitation cases. Tr. 782.

In less than two weeks, Ms. Hagen was able to speak with eight employers regarding their Sales Route Driver positions. Tr. 782. One of those employers was Arrowhead Water, who explained to Ms. Hagen that they have hired a Sales Route Driver every year since 2010 and expect to continue hiring for this position every year. Res. 46. Further, they reported that they accept applications for this job throughout the year. Res. 46. Similarly, Frito-Lay indicated they hire for this position throughout the year—sometimes twice, depending on the area—and have hired drivers for this position every year from 2010 to 2016. Res. 46. Giuliana Bakery and HD Supply have also hired for this position every year from 2010 to 2016. Res. 46.

Notably, Mares originally alleged he applied to Frito-Lay and was rejected for failing a lengthy test. Tr. 978. However, Mares later clarified that this did not occur during the backpay period. Tr. 985. Rather, he said it occurred prior to his employment with Respondent, when he worked at Frito-Lay as a Merchandiser. Tr. 985. Mares said he wanted to change his position at Frito-Lay to a Driver but did not pass the required test. Tr. 985. However, Mares alleges that during the backpay period, he applied twice to Frito-Lay in less than two months. GC Ex. 6.

c) Based on Ms. Hagen's Expert Opinion, if Claimants Had Engaged in a Reasonable Search, Claimants Would Have Found Comparable Employment Within 4.75 Months.

Ms. Hagen's expert opinion is that if Claimants engaged in a reasonable search, Claimants would have found comparable employment within 4.75 months. Based on the Department of Labor, Bureau of Labor Statistics, the median duration in which individuals with the same or very similar positions were able to find employment was between 22.1 to 26.1 weeks in 2010. Tr. 785-786; Res. 48. In 2011, the median duration of unemployment was 21.8 to 26.9 weeks. Tr. 785-786; Res. 48. As Ms. Hagen describes in the Labor Market Evaluation she completed for each Claimant, Mares and Avila should have found comparable work within 4.75 months after their employment with Respondent ended. Res. 50 and 51. Notably, as discussed above in Section IV.A.1., Mares indicated he worked at Nature's Own shortly after his employment with Respondent ended, which is consistent with Ms. Hagen's findings. Tr. 787; Res. 48 and 50.

Importantly, Ms. Hagen did not take into consideration the unemployment rates for Los Angeles County when conducting her analysis because they were not relevant for this position. Tr. 815. Based on her research, the number of jobs in the sales route position actually increased in Los Angeles County over the years. Tr. 815; Res. 47. In fact, by 2016, the number of jobs in this position increased by over 5,000. Tr. 815; Res. 47.

Furthermore, both Claimants used online resources in their job search but since neither engaged in a reasonable search, they ignored and refused to take advantage of the ease and convenience of online job searching. Claimants made minimal efforts in using technology as part of their search efforts. Mares stated he posted his resume to social media – and that is it. Tr. 419. Similarly, Avila stated he used Indeed.com to post his resume online and search for jobs, but he did not specify how many jobs to which he actually applied. Tr. 1109; 1115; 1117-1119. Nor did Avila ever submit any documentation regarding his online efforts. In fact, when Claimants' NLRB Forms are reviewed, Mares indicated he never applied online for jobs and Avila indicated he applied online only ten times in a six-and-one-half-year period. In a time where accessing available job positions can be done on one's phone at almost any time and almost at any place, Claimants' lack of use of technology is unbelievable.

Ms. Hagen reported that, after her review of Claimants' job descriptions, payroll information, resumes, NLRB Forms, and her abovementioned research, her Labor Market Evaluations did not change and, in fact, her assessments and opinions were confirmed. Tr. 793; Res. 50 and 51. In sum, Ms. Hagen's expert opinion is that if an individual were performing a diligent job search for this position, the individual would have found a new job within five months. Tr. 807. **Ms. Hagen explicitly explained that contacting one employer per month is not a diligent search**. Tr. 808. Ms. Hagen recommends individuals who are looking for work contact at least five employers per day. Tr. 808. As she explained, "All the literature says that looking for a job has to be a full-time job. You need to spend as much time looking for a job as you would attending to a job." Tr. 817. Here, Claimants did not look for work for numerous weeks each month.

d) Based on Ms. Hagen's Review of Claimants' NLRB Forms, Claimants Failed to Engage in a Reasonable Search for Interim Employment.

As part of her analysis, Ms. Hagen reviewed both Claimants' NLRB Forms. Tr. 789-790. Based on her review of the NLRB Forms, she concluded Claimants failed to engage in a reasonable search for interim employment. The NLRB Forms indicated that Mares contacted **less than one different employer per month** in his efforts to search for work during the backpay period. Tr. 790-791; GC Ex. 6. Avila contacted only **one-and-one-half employers per month** in his search for work efforts. Tr. 790-791; GC Ex. 14. Moreover, Claimants' NLRB Forms included many duplicate contacts of employers. Tr. 790; GC Ex. 6 and 14. Notably, Ms. Hagen noted that Avila was able to find employment only once his Unemployment Insurance benefits neared their end. Tr. 791. It is no coincidence that as soon as Avila's Unemployment Insurance benefits began to end, Avila found a job.

2. Mares Failed to Seek Comparable Interim Employment and Admitted Stopping His Search for Work Even Though He Had Not Secured Comparable Work.

Mares failed to seek comparable interim employment. He said that after his termination he went to Work Source for assistance in preparing applications and applying for jobs. Tr. 419. Yet, he only went there about once or twice per month. Tr. 420. Mares admitted that once he began working for Pacific Foods, he stopped his search for work efforts even though he had not secured a comparable position. Thus, from January 17, 2011 to August 23, 2016, Mares stopped searching for comparable work.

Mares failed to seek comparable interim employment by, first, unreasonably limiting his search efforts to only driver positions, without any justification for doing so. Tr. 423; 450. This is especially true given that Mares' position with Respondent was a sales position. Tr. 835-838; 868. Second, once Mares secured employment with Pacific Foods, he almost immediately

completely stopped searching for work. However, Mares accepted a driver position earning minimum wage. Mares should have continued to search for comparable work, especially in light of Ms. Hagen's analysis, described above.

Mares began his employment with Pacific Foods on January 17, 2011, and continues to work there. Tr. 429. He found this job by calling a phone number he saw on the side of a Pacific Foods truck. Tr. 429. Mares was hired as a driver. Tr. 429. At Pacific Foods, Mares makes deliveries, removes expired product, and places new product on the shelves. Tr. 430. Mares alleged he does not engage in sales duties at Pacific Foods.

Mares later contradicted his testimony in which he stated that once he became employed by Pacific Foods, he stopped looking for work, simply because he had a found a job. Tr. 431. In his NLRB Forms, he also indicated he stopped searching for work during this time. Tr. 496; GC Ex. 6. However, Mares later changed his testimony to state he applied for one job while working for Pacific Foods, because it was closer to his home. Tr. 455-456. That application was made to LA Specialty Produce. Tr. 501. Mares said he did not accept the job because it paid less than what he earned at Pacific Foods. Tr. 456. However, Mares later contradicted this testimony, too, by admitting he actually had not applied to LA Specialty Produce while working at Pacific Foods. Rather, he applied in October 2010, as indicated in his NLRB Employment and Expense Report forms, prior to the start of his employment with Pacific Foods. Tr. 501; GC Ex. 6.

Mares claimed that all the places he contacted in his search for work efforts are listed in the NLRB Employment and Expense Report forms, and that he maintained no separate record of his search efforts. Tr. 425; 494-495; GC Ex. 6. Thus, the forms are not substantiated and are based solely on Mares' alleged recollection of his alleged search for work efforts. As noted above,

the forms indicate Mares stopped searching for work even though he had not found comparable work.

3. Avila Took Almost Two Years After His Employment Ended with Respondent to Find Another Job, and Did So Only After His Unemployment Benefits Were Coming to an End.

Avila alleges it took him almost two years to find another job after his employment with Respondent ended. When his employment ended with Respondent, Avila applied for and received Unemployment Insurance (UI) benefits. Tr. 548-549. Avila continued to receive Unemployment Insurance benefits for almost two years, until the end of 2012, when he received his last UI payment. Tr. 550. Avila knew his unemployment benefits would expire near the end of 2012. Tr. 630. Unsurprisingly, at about the same time, Avila began his employment with AT&T, in July 2012. Tr. 553. It is apparent Avila did not engage in reasonable efforts to search for work until his unemployment benefits were running out.

4. Avila Left the Country for a Six-Month Period and Was Not Searching for Work During This Period.

Avila went to Mexico for six months during the backpay period and was not searching for work during that time. Avila's MySpace page indicates he went to Mexico in 2011 and that he was out of the country for six months. Res. 19(a). Avila confirmed he posted photos from his visit to Mexico City in 2011. Tr. 649. Avila also posted photos to his MySpace page in 2011 of his trip to Tepic, Nayarit. Tr. 649. While Avila later attempted to deny he posted the photos in 2011, saying he could not remember when the photos were posted, he gave no explanation as to why he no longer believed the photos were not posted in 2011. Tr. 700. The change in Avila's testimony is not credible.

Furthermore, Avila specifically commented on his MySpace page that he had not "been here [the United States] in a while im [*sic*] back lol," and his next post states "over 6 months lol." Res. 19(a). During the Hearing, Avila never clarified these statements.

C. Claimants Attempted to Obfuscate the Record by Alleging They Were Only Drivers While Working for Respondent, but Then Admitted They Were Salesmen at Respondent.

Claimants attempted to allege their job duties while working for Respondent only included driver duties. However, Claimants each admitted this was untrue and that they were route salesmen while employed by Respondent. Their primary job was to make sales, sales drove their job performance, and sales were how Respondent made money. Moreover, Respondent's Controller, Arturo Perfecto, detailed the job duties Claimants performed for Respondent, which he reported as predominantly sales duties, which included driving.

1. As Perishable Sales Representatives, Mares and Avila Routinely Performed Sales Duties and Received Commissions on the Sales They Made While Employed by Respondent.

As Perishable Sales Representatives, Mares and Avila regularly engaged in sales and received commissions on the sales they made while working at Respondent. Mr. Perfecto, Respondent's Controller, explained Claimants' job duties at Respondent. The Perishable Sales Representative picked up inventory and visited customers based on a set geographical route. Tr. 833. Once at the customer's, the Perishable Sales Representative assessed inventory and prepared an invoice based on their assessment. Part of their duties included looking for new sales opportunities, such as recommending the customer purchase additional product that has been selling well or promote products that have special promotions. Tr. 835-836.

Perishable Sales Representatives make sales to stores. Tr. 837-838. Perishable Sales Representative's job duties include providing customer service to help customers sell more product and, in turn, to motivate customers to buy more product from Respondent. Tr. 835-836.

Additionally, Perishable Sales Representatives had the ability to modify certain products' pricing to sell more of those items to a customer. Tr. 856. Further, if a customer was willing to buy more product, Perishable Sales Representatives could sell as much as they wanted; there was no limit to the amount of product a Perishable Sales Representative could sell. Tr. 868. In sum, sales played a major role in a Perishable Sales Representative's job duties.

2. Mares Attempted to Allege His Job Duties at Respondent Only Included Driver Duties, but Ultimately Admitted He Was a Route Salesman.

During his testimony, Mares asserted he only performed driver duties at Respondent and did not engage in any sales. Mares alleged his only duties while employed with Respondent were simply to restock the shelves and remove expired product. Tr. 410. However, Mares later contradicted his testimony and admitted he was a Route Salesman while employed by Respondent. Tr. 478-479.

Mares explained that while working at Respondent's, his duties as a Perishable Sales Representative included selling products, taking customers' orders, preparing sales invoices, having customers sign the invoices, and meeting with customers to determine their needs and whether they had enough product to meet those needs. Tr. 479-480. Mares further confirmed that his job duties were listed in Respondent's Job Description for Perishable Sales Representative, including the duty of completing the sales process with customers. Tr. 482-483; Res. 21. Still further telling, Mares noted in his resumes that his skills included sales. Res. 10 and 22. In short, Mares had extensive experience as a route salesman, especially when working at Respondent. Tr. 481.

3. Avila Attempted to Allege His Job Duties at Respondent Only Included Driver Duties, But Ultimately Admitted He Was a Route Salesman.

Similarly, Avila attempted to obfuscate the record by alleging he was only a driver and did not perform sales duties while employed at Respondent. Tr. 576. However, Avila repeatedly contradicted himself and eventually admitted that he was a Route Salesman. Tr. 576-577.

While working at Respondent, Avila earned an hourly rate plus commission on net sales. Tr. 579; Res. 27. Because he earned a commission on net sales, Avila stated he was motivated to "sell as much as you can to make sure you get .5 of that sale." Tr. 581. Avila's primary job duties as a Perishable Sales Representative indisputably included sales.

Avila admitted that a significant portion of his job duties with Respondent included meeting with deli managers and meat managers to increase sales of certain products and to entice them to buy more product. Tr. 576-577. Accordingly, Avila took customer orders, prepared sales invoices, and worked with customers to determine their product needs. Tr. 577-578. In fact, Avila blatantly explained that as part of his sales, "If a customer wants [to buy] the whole truck, I will sell him the whole – everything on the – whatever is on the – my vehicle, whatever the case may be, my work truck." Tr. 578. Avila also merchandised the area where the product was on the shelf in the hope it would make the product more attractive to customers and increase sales. Tr. 578-579.

D. Claimants Signed Release Agreements with Respondent, Releasing Their Backpay Claims.

Both Mares and Avila signed release agreements with Respondent, releasing their claims to any alleged backpay. Notably, when Mares entered into a release agreement with Respondent, he specifically did so because he had no intention of returning to work. When Avila entered into a release agreement with Respondent, both Avila and his attorneys were aware of Avila's pending NLRB case and specifically released Avila's claims brought by any government agency.

1. Mares Signed a Workers' Compensation General Release Agreement in 2012, in Which He Agreed Not to Return to Work With Respondent and Released All Pending Claims Against Respondent.

Mares signed a Workers' Compensation general release agreement in August 2012. Tr. 513. At the time he signed the agreement, Mares was represented by counsel and had an interpreter present. Tr. 513. Mares agreed not to return to work for Respondent and released all his pending claims against Respondent. The release includes the release of all of Mares' employment claims against Respondent. Tr. 514; Res. 14. **Notably, Mares explicitly stated he released his claims against Respondent because he no longer wanted to return to work with Respondent and wanted to remain working at Pacific Foods.** Tr. 514-515. Mares' own testimony establishes his intent not to return to work at Respondent. Mares explained that he checked the box on the Workers' Compensation form that specifically states "employment" because he did not want to return to work for Respondent. Tr. 514-515. As discussed below, this is what Respondent agreed to as well.

Respondent had a similar result in mind. As Mr. Perfecto explained, Respondent entered into this agreement to resolve all outstanding issues with Mares and bring final closure with regard to his employment at Respondent. Tr. 845-846. Mr. Perfecto, as Respondent's Controller, was involved in the decision-making meetings with respect to the settlement agreement. Tr. 866. Additionally, at a later time and separate from Mares' Workers' Compensation claim, Mares received a separate payment as part of the class action lawsuit brought by Avila. Tr. 515; Res. 23.

2. Avila Signed a Settlement and Release Agreement in 2016 in Which He Released All Pending Claims Against Respondent.

In 2016, Avila signed a settlement and release agreement releasing all his employment claims against Respondent, including Avila's NLRB case. At the time Avila entered into the settlement agreement, Avila was represented by counsel. Tr. 637-638. Further, Avila and his

counsel were aware Avila had a pending NLRB case against Respondent. During the course of his class action lawsuit, Avila's deposition was taken. Avila testified that his NLRB case was still pending, and thus all parties were aware of the case. Tr. 640; Res. 32. That is why there is a specific reference to releasing claims against Respondent brought via government agencies. Tr. 852; Res. 17. As the lead plaintiff in the class action, Avila's settlement agreement and payment was in addition to and separate from any payment he would receive as a class member.

Importantly, after reviewing the release agreement, Avila did not raise any concerns with his attorney regarding the release. Tr. 647. In exchange for signing the release agreement, Avila received $5,000. Tr. 643; Res. 34. Mr. Perfecto, as Respondent's Controller, was involved in the decision-making meetings with respect to the settlement agreement. Tr. 866. As Mr. Perfecto explained, Respondent did not enter into a separate settlement and release agreement with each class member as it had with Avila. Tr. 852. Respondent chose to do so with Avila to settle all remaining disputes and issues with Avila, including the pending NLRB backpay case. Tr. 852. This is yet another reason why the parties specifically referenced releasing claims against Respondent brought via government agencies. Tr. 852; Res. 17. As with Mares, Avila also received a separate payment from the class action settlement. Tr. 642; Res. 33.

E. <u>Avila Unreasonably Abandoned His Interim Employment with AT&T</u>.

Avila unreasonably abandoned his job at AT&T. Tr. 599; 735; Res. 41. Avila began working for AT&T in July 2012 in the position of Telesales. Tr. 553. Notably, Avila's resume indicates his job at AT&T was sales and that his position with Respondent was "Salesman." Res. 53. By the time Avila abandoned his position with AT&T, he was earning $16 per hour plus commission. At Respondent, Avila made $11 per hour plus commission.

Sometime in 2014, Avila applied for short-term disability benefits, but his request was denied. Tr. 737. Thereafter, Avila took a 5-day FMLA leave in about September 2014 and never

returned to work. Tr. 599-600; 610; 739. Avila never notified AT&T of his decision not to return to work. He simply never returned to work. Tr. 600; 610; 736. AT&T's Human Resources Business Partner, Marilyn Hagelberg, confirmed Avila never returned to work. Further, Avila never submitted any paperwork to AT&T stating he was taking FMLA leave due to stress. Tr. 609; 611; 736. As Ms. Hagelberg explained, because Avila did not return to work after his leave ended in September 2014, AT&T began the return-to-work process with Avila. Since Avila did not participate in the process, AT&T assumed Avila abandoned his job on October 14, 2014. Tr. 739-740.

Furthermore, Avila received a wide variety of benefits while employed at AT&T, including vacation time; paid time off; tuition reimbursement; medical, dental and vision insurance; and a 401K plan. Tr. 729; 1136. The collective bargaining agreement ("CBA") that governed Avila's terms and conditions of employment also listed the benefits Avila received at AT&T, including ten paid sick days, ten paid vacation days, and one Excused Day With Pay is earned with every three months. Res. 36. Avila also received discounts on AT&T wireless services and preferred discounts from other vendors with whom AT&T has relationships, including car rentals and hotels. Tr. 729. Avila testified he was eligible for and did receive a bonus and rewards under AT&T's Orange Card awards conversion. Tr. 1137. In fact, Avila received bonuses in the amount $860, $810, $630, $375, $342, $300, $218, and $150, and more, under AT&T's bonus and rewards conversion program. GC Ex. 36.

Avila further admitted he received increased pay every six months while at AT&T. Tr. 1137-1138; Res. 60. The increases occurred automatically and were not tied to performance. Tr. 1138. Avila did not receive any of these benefits at any other interim employer. Avila also worked the shortest number of hours at AT&T than he did at any subsequent interim employer.

1. Avila Gave Conflicting Reasons for Abandoning His Position at AT&T.

Avila repeatedly misstated his reasons for leaving AT&T. One reason Avila alleged for his job abandonment was an attendance system that applied punitive points when he was absent from work or tardy. Tr. 601. However, Avila testified that he was subject to such discipline at every other interim employer and while working at Respondent's, if late to work, just as at AT&T. Tr. 601-602. Importantly, Avila explains that at the time he abandoned his job with AT&T he was no longer concerned about his attendance points because the points were falling off already. Tr. 616.

Furthermore, in his employment application to Mel O Dee Ice Cream ("Mel O Dee"), Avila stated he left AT&T because AT&T closed the department in which he worked. Tr. 598; Res. 29. While explaining why he wrote that on his application, Avila stated that at the time he believed the department was going to close, although he did not know if it actually did. Tr. 599. Notably, during his explanation, Avila never stated that he was stressed at AT&T and that he left because of stress. Tr. 599.

2. Although Avila Alleges He Left AT&T For Various Reasons, Avila Did Not Seek the Help of His Union to File a Grievance or Take Any Other Action.

Despite alleging various reasons caused him to abandon his job at AT&T, Avila did not ask his union for help or file a grievance or take any other action to attempt to improve his work environment at AT&T. Instead, he simply abandoned his position. As noted above, Avila's position with AT&T was a union position covered by a CBA. Tr. 724. The CBA includes provisions allowing employees, including Avila, to file grievances with AT&T regarding their employment. Res. 36. The CBA also provides for binding arbitration as part of the grievance procedure. Res. 36. One reason Avila gave for abandoning his job was the alleged stress he suffered at AT&T. Although Avila stated he suffered from stress because of AT&T's point

system, at no time did he file a grievance about the point system or about any other reason. Tr. 733.

Avila received multiple counseling advisories, a warning, and a final written warning because of his accumulated attendance points. Res. 37, 38, 39, and 40. As Ms. Hagelberg explained, Avila never filed any grievances regarding these counseling advisories and warnings. Tr. 733-734. Throughout his testimony, Avila alleged multiple reasons as the source to cause him to quit, including stress, the belief the department was going to shut down (it did not), and the attendance point system. Yet, Avila never filed any grievances during his employment with AT&T. Tr. 733. Avila also never filed any complaints during his employment. Tr. 736. In his NRLB Forms, Avila specifically stated he did not search for work while employed at AT&T. GC Ex. 14. Avila further confirmed this when he stated that he did not list any potential employers during the period he worked for AT&T because he did not search for other employment. Tr. 591.

Additionally, Avila alleges he attended two job fairs while employed by AT&T. Tr. 560-561. However, this is not true. Documents about open positions that he claims he received from the first of these job fairs while at AT&T are dated May 1, 2012, which predates Avila's employment with AT&T. GC. Ex. 23. As to the second job fair Avila allegedly attended, Avila could not remember if he applied to any of the open positions listed on the documents he received at that job fair. Tr. 563; GC. Ex. 23.

3. Contrary to Avila's Assertions, His Position at AT&T Was Comparable to His Position with Respondent.

Avila alleges his work at AT&T was not comparable to his work with Respondent because it was in sales and his job with Respondent was that of a driver. Tr. 554-555. However, Avila's own resume disproves his allegations. Avila lists his position with Respondent as "Salesman." Res. 53. In fact, Avila specifically describes his skills and objective on his resume: "Goal-oriented

to **any sales environment** dedicated to high levels of customer satisfaction and meeting aggressive business goals." Res. 53; emphasis added. Avila also states that at Respondent, his job duties included "[p]roviding the best service possible to increase sales for the company." Res. 53. Almost every position listed on Avila's resume is sales-related, either wholesale or retail, both before his employment with Respondent and afterwards.

While at AT&T, Avila was required to sell AT&T's products, including their cell phone services and DIRECTV services to customers. Tr. 554. As described in detail in IV.C.2, Avila's job duties with Respondent primarily included sales (*e.g.*, taking customer orders, preparing sales invoices, taking orders of products, selling as much product as possible, etc.), just as they did with AT&T. Tr. 577-578. At AT&T, Avila made sales and earned an hourly rate plus incentive pay, just as he did with Respondent. Tr. 598; 728.

Even after leaving AT&T, Avila continued to perform sales duties at almost every other interim employer. Avila worked at Macy's in or about November 2014 as a Sales Associate. Tr. 564. At Macy's, Avila rang up customers and engaged in customer service activities. Tr. 565. About June 12, 2015, Avila started working at Helados La Tapatia, which included sales duties. As with Avila's work at Respondent's and AT&T, Avila earned an hourly rate and was eligible for commissions. Tr. 627-628. Moreover, in or about July 2015, Avila began working at Mel O Dee Ice Cream as a Salesman. Tr. 570. As with Avila's duties at Respondent and AT&T, Avila again was involved in sales. Avila sold a variety of ice cream to customers and provided a variety of customer service activities. Tr. 570-571. Just as with Respondent and AT&T, Avila earned commission on his sales. Id.

Prior to his employment with Respondent, Avila had extensive experience working in sales positions. Tr. 575-576. Avila was an Assistant Manager at Off Broadway Shoes, a retail sales

store. Tr. 575-576. Avila was also an Assistant Manager at Payless Shoes, another retail sales store. Tr. 576. Simply put, Avila worked in sales his entire career and AT&T was no exception.

F. Avila Was Terminated by an Interim Employer for Failing to Come to Work.

Avila was terminated by LA Corr for failing to come to work. Avila attempted to obfuscate this fact by stating he resigned from LA Corr because he had previously applied to Helados La Tapatia and had been offered a job there. Tr. 569. However, it was later revealed, and Avila admitted, that this was not true. In reality, Avila had been terminated by LA Corr for missing work. Tr. 621-622; Res. 30. Avila had previously testified to this fact under oath. Tr. 621-622; Res. 30.

Avila's prior testimony is more reliable than the testimony at the Hearing because it was closer in time to the date of the events in question (*i.e.*, his termination at LA Corr and his new position at Helados La Tapatia). Thus, Avila's memory at the time of his deposition testimony should be given more weight. Furthermore, Avila's credibility is reduced by the fact that he changed his testimony at the Hearing in an effort to bolster his backpay case.

G. The Compliance Officer's Backpay Calculations Are Unreasonable.

The Compliance Officer calculated the alleged backpay owed by Respondent in this case and prepared the Compliance Specification. Tr. 150-151. The Compliance Specification includes backpay computation, all alleged interim earnings, and expenses owed to the Claimants. Tr. 152; GC Ex. 1.

Steben was assigned this case in January 2017. Tr. 278. Even though the backpay period spanned six years, Steben did not perform any work on this case until January 2017. Tr. 278-279. Additionally, Steben was only appointed to the position of Compliance Officer in January 2017. Tr. 280.

1. Steben Admitted She Did Not Follow the Procedures Set Forth in the NLRB Case Handling Manual for Compliance Officers.

Steben admitted she did not follow the procedures set forth in the NLRB Case Handling Manual for Compliance Officers:

Backpay Investigation Procedure Set by the CHM	Steben's Testimony Regarding Her Execution of the Backpay CMM Procedure
The discriminatee is the most important source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. It is of utmost importance that contact is maintained with discriminatees throughout the course of unfair labor practice proceedings. CMH Section 10550.2; JT Ex. 1.	Q BY MR. SIEGEL: Isn't it true that, as a compliance officer, you should keep regular contact with the claimants? Is that correct? . . . **THE WITNESS: No, not necessarily.** Tr. 282; emphasis added.
At appropriate times in the course of compliance proceedings, all discriminatees should be interviewed either in person or by telephone to review and update information concerning the following issues: • availability for employment, • efforts to obtain interim employment, • identity of all interim employers, • earnings from interim employment, • expenses incurred in seeking and holding interim employment, and • periods of low earnings and unemployment. During the interview, the Compliance Officer should address any issues concerning the discriminatees' responsibility to seek interim employment and their availability for interim employment. Sections 10558 and 10560. The result of the discriminatee interview should be a complete account of their employment related activities during the backpay period and identification of all issues concerning interim earnings, expenses, and availability for employment. CHM Section 10550.3; JT Ex. 1.	Q: And that they're informed that they must keep accurate records for the entire back period of time with respect to any and all attempts to seek employment whether they're successful or not. A: I believe that's what the letter says. Q: Are they told that also? **A: No. I don't have any knowledge of that. I don't know.** Q: Well, I'm asking you as a compliance officer, is it your practice to tell claimants that? A: No, they are advised in a letter. . . . Q: Now did you ever communicate or did anyone else, to your knowledge, communicate to Mr. Avila or Mr. Mares that they have a duty to continue to search for interim employment throughout the back pay period? A: I don't know.

Backpay Investigation Procedure Set by the CHM	Steben's Testimony Regarding Her Execution of the Backpay CMM Procedure
	Q: But you didn't is what you're saying? **A: I did not.** Tr. 290-291; 305; emphasis added.
It may be inappropriate to contact current interim employers for earnings information because communications from the Compliance Officer could adversely affect the discriminatee's current employment relationship. Thus, the Compliance Officer should consult with the discriminatee regarding that relationship before going to the current interim employer for earnings information. Former interim employers may be contacted to obtain appropriate documentation, although without discriminatee authorization many employers will not release employment information. Appendix 6 sets forth a pattern letter that may be used for requesting earnings information from an interim employer. CHM Section 10550.3; JT Ex. 1.	Q: If -- and a compliance officer should -- after communicating with a claimant, should also follow up with any former interim employers; is that correct? **A: No.** Q: And then isn't it true that a compliance officer should contact interim employers for appropriate documentation -- **A: No.** . . . Q: And that the compliance officer should also contact the former interim employer for corroboration? **A: No.** . . . Q: And the document in front of you, Respondent's 9, is appendix six to the compliance manual. So it's part of the compliance manual. Do you use this letter as -- as affixed to the compliance manual? . . . THE WITNESS: I've – . . . THE WITNESS: -- never seen this letter. Tr. 283-285; emphasis added.

Steben contradicted herself throughout her testimony and contradicted the Case Handling Manual ("CHM") requirements for Compliance Officers. For instance, Steben denied the

importance of maintaining contact with a claimant during the entirety of the backpay case. Tr. 280. Steben denied that Compliance Officers should send and receive the NLRB Employment and Expense Reports on a quarterly basis at minimum. Tr. 281. Steben also denied the need of Compliance Officers to meet with claimants on a quarterly basis or to interview claimants on a quarterly basis regarding their search for work efforts and interim earnings. Tr. 281.

Surprisingly, Steben denied the need for Compliance Officers to even maintain regular contact with claimants during the backpay period. Tr. 282. In fact, Steben testified that there could be instances where she does not talk to claimants in a backpay proceeding except on an annual basis. Tr. 292. Further, while claimants are informed by a standard Board letter early in a backpay investigation, attached as Appendix 6 to the CHM, that explains their obligations to maintain accurate records regarding their search for work efforts, interim earnings and expenses, Steben herself does not necessarily communicate this information directly to a claimant early on in the case. Tr. 291; Res. 9. Rather, she may remind a claimant of this obligation later once she begins to talk with them, but she does not specifically remind them of their backpay obligations. Tr. 292-293.

Steben did not remind either Mares or Avila of their backpay obligations. Tr. 293. Steben never communicated to either Mares or Avila their duty to continue to search for interim employment throughout the backpay period. Tr. 305. Notwithstanding her aforementioned contradictions and departures from the CHM, Steben asserts that the CHM was "the main source" she relied upon in calculating Claimants' backpay amounts. Tr. 374.

2. Steben Did Not Contact a Single Interim or Former Interim Employer During the Entire Backpay Period.

In fact, Steben did not receive any information from any interim or former interim employers. Tr. 287. She relied exclusively on Claimants' NLRB Forms and, as was the case with

Avila, verbal statements regarding his alleged interim earnings. **Steben did not even attempt to contact Claimants' interim or former employers**. Rather, Steben denied the need for Compliance Officers to contact former interim employers for corroboration of reasons a claimant is no longer employed. Tr. 284. Steben testified she never used or even saw the standard interim earnings letter to be sent to a claimant's former interim employers. Tr. 284; Res. Ex. 9. In fact, Steben confirmed that throughout her investigation of Claimants' backpay cases, she never sent any letters to any of Claimants' former interim employers requesting documents or information from them. Tr. 286. Nor did Steben call or email any of Claimants' interim or former interim employers requesting documents or information from them. Tr. 287. Rather, all information regarding interim and former interim employers came only from Claimants. Tr. 287.

3. Steben Contradicted Her Own Testimony, Alleging at First She Did Not Speak with Claimants Directly, Then Changed Her Testimony to Allege She Did Speak with Both Claimants.

Steben also contradicted her own testimony. At first she alleged she did not communicate directly with Claimants. Later, she changed her testimony to state she did speak with Claimants. However, she once again changed her testimony and stated she never communicated with Mares during the backpay period regarding his efforts to seek employment, and regarding each interim employer. Tr. 320-322.

Initially, Steben asserted she never contacted Mares directly to ask whether he had worked anywhere else during the backpay period. Tr. 171. Steben first stated that because she did not interview Mares, she was unaware he worked at an undisclosed interim employer, Nature's Own, prior to his work at Pacific Foods. Tr. 321; Res. Ex. 10. Steben admitted that if she had talked with Mares regarding his interim employment efforts and discovered his employment at Nature's Own, she would have sought documents from him regarding his employment there. Tr. 322.

Furthermore, Steben was unaware if Mares accepted Respondent's offer of reinstatement dated August 2, 2016. Tr. 155; GC Ex. 2. It is uncontroverted that Respondent's offer of reinstatement was adequate under the law. Tr. 155. Steben further admitted that to her knowledge Mares did not work for any other employer during the backpay period. Tr. 170. However, Steben did not take any action to verify this assumption.

Upon additional questioning by the ALJ, however, Steben changed her testimony and alleged she did have a conversation with Mares through the use of an interpreter. Tr. 186. During their discussion, Steben allegedly confirmed the information Mares had provided on the NLRB Employment and Expense Reports he submitted. Tr. 186-187. Steben testified that based on her review of the case file, Mares allegedly discussed his search for work efforts with a prior Compliance Officer two weeks after his employment ended with Respondent. Tr. 188. Steben alleged she later confirmed Mares' efforts via a telephone conversation with the use of an interpreter. Tr. 187-188. However, this would have necessarily occurred no sooner than January 2017, when Steben was first assigned this case, more than six years later. Thus, without any supporting documentation, Mares' recollection should not be credited. Mares allegedly informed Steben he was talking with friends and family for job leads during this time. Tr. 188.

4. <u>Claimants Admitted to Completing the NLRB Forms for the Entire Backpay Period All at Once at the End of the Backpay Period</u>.

Contrary to Steben's assertions, Mares readily admitted he never spoke with Steben regarding his backpay case, his efforts to search for interim employment, or his interim earnings. Tr. 508. In fact, Mares directly contradicted Steben's testimony, confirming he never had a conversation with the NLRB about his unemployment using an interpreter. Tr. 509. Steben's testimony is not credible.

Mares and Avila admitted to receiving and completing the NLRB Forms for the entire six-year backpay period all at once, and that, consequently, the completed forms were not accurate or credible. The NLRB Forms were completed all at once based off Claimants' memories going back more than six years. The NLRB Forms are not supported by journals, logs, diaries, calendars, or any other document authenticating the entries on the NLRB Forms. Further, as described in detail below, the limited documents Claimants alleged supported their entries were provided only to the Compliance Officer and CGC, and not produced to Respondent. In short, Respondent asserts Claimants made up the entries after the fact.

Steben also admitted that the Board failed to follow its required procedures to determine interim employment, earnings and expenses incurred by a claimant. Under Board procedures, Compliance Officers are to send the NLRB Forms quarterly to a claimant. Tr. 176. The Compliance Officer must also send a letter with the forms explaining how a claimant should fill them out, describing how a claimant must record the number of miles they travel to search for work, and how they must report when they obtain work. Tr. 176.

Here, the Compliance Officer did not send the NLRB Forms to Claimants until 2016 to be completed. Tr. 505. Once Claimants received the forms in 2016, Claimants filled out the forms for the entire backpay period – spanning 6 years – all at once, in 2016. Tr. 505; 627. Thus, information relating to alleged search for work efforts that took place long prior, such as in 2011, for instance, were not completed until after five years or more, and were based solely on Claimants' memories since Claimants admitted they did not maintain any separate record of their search for work efforts at the time. Tr. 494; 591-592.

In fact, Mares asserted that when he filled out the NLRB Employment and Expense forms, the dates he listed were not always accurate and that he could have gone to the employers on

different dates than those listed on the forms. Tr. 493-494; GC Ex. 6. His contention, however, is undercut by the fact that Mares was clearly told, knew, and understood the importance of keeping accurate records of all his efforts to seek employment. Tr. 494.

5. Both Claimants Admitted That Other Than the NLRB Forms, They Maintained No Separate Journal, Calendar or Any Other Record of Their Search for Work Efforts.

Mares and Avila admitted they maintained no separate journal, calendar or other record aside from the NLRB Forms regarding their search for work efforts. Avila explained he was informed he must keep accurate records of his search for work efforts and did so only by filling out the NLRB Forms. Tr. 591-592. Avila did not maintain any separate journal, log or other document indicating his search for work efforts. Tr. 591. In fact, Avila submitted the same information to the State Employment Development Department ("EDD") as he did in the NLRB Forms. Tr. 630. The only items Avila submitted to the Compliance Officer demonstrating his search for work efforts were the NLRB Forms. Tr. 591-592.

Notably, Avila admitted that the fliers he allegedly obtained from attending job fairs were never submitted to the Compliance Officer. Rather, they were submitted to CGC to prepare for the Hearing. Tr. 592. The first time Avila submitted the fliers to Steben was on the first day of the Hearing. Tr. 592. Avila willfully withheld the fliers until the second day of the Hearing, when he ultimately produced them to Respondent.

As noted above, Mares also understood he was to list all his efforts in seeking employment on the NLRB Forms. Tr. 494. Mares confirmed that all his efforts to seek employment were listed in these forms and that he maintained no separate record of his search for work efforts. Tr. 494-495. Yet, the wage rates listed by Mares on the NLRB Forms are inaccurate. Tr. 503.

6. The Compliance Officer Failed to Verify the Accuracy of the Records Produced by Claimants Regarding Their Search for Work Efforts.

Steben failed to verify the accuracy of the records produced by Claimants regarding their search for work efforts. Steben admitted she did not rely on any other documents to compute Mares' interim earnings. Tr. 170. Rather, Steben simply relied on the "standard NLRB documents" that are sent to claimants in backpay proceedings. Steben relied only on these documents to determine all alleged places of interim employment. Tr. 171. In fact, upon questioning by the ALJ, Steben admitted that upon her review of the file after computing Mares' backpay calculations, she discovered he operated a trucking business. Tr. 173.

However, Steben admitted she was unaware whether Mares continued to operate this trucking business after his employment with Respondent ended and never sought to clarify this. Tr. 174. Mares never gave Steben any proof of payment by cash payments, personal checks or other cancelled checks, income from bank statements, or 1099 forms. Tr. 288.

Similarly, to calculate his alleged backpay, Steben relied only on Avila's NLRB Forms and the Social Security form he provided her. Tr. 169; 204; 206; GC Ex. 13. Specifically, Steben used the NLRB Forms to determine Avila's interim earnings for 2015 because, according to Avila, the amount listed on the Social Security Form did not include amounts that were not reported to Social Security. Tr. 206.

a) Steben Relied Solely on Avila's Verbal Assertions of His Interim Earnings and Never Verified Avila's Assertions.

Moreover, during her discussions with Avila regarding the amounts listed in the Social Security Form, Steben was verbally informed by Avila of the amounts he allegedly earned working at different interim employers. Tr. 206. Based on these conversations, Steben calculated the amount of interim earnings for 2015, in conjunction with the Social Security Form and the NLRB Form. Tr. 207-208; GC Ex. 14. Steben admitted she did not know whether the earnings listed in

the NLRB Forms were reported to Social Security, but that she simply assumed they were. Tr. 208. Steben did not confirm or verify the amounts reported in the NLRB Forms or the Social Security Form. Tr. 209.

Steben relied solely on Avila's verbal assertions of the amounts of interim earnings he obtained while working at various employers. This was especially true for the Compliance Specification involving interim employers who did not report his earnings to Social Security, such as Mel O Dee Ice Cream. Tr. 210-211. Steben never contacted Mel O Dee Ice Cream to verify the amounts given to her by Avila, relying only on Avila's word. Tr. 211-212; 351. Avila never gave Steben any proof of payment by cash payment, personal checks or other cancelled checks, income from bank statements, or 1099 forms. Tr. 288. Steben also admitted she never requested a Social Security waiver form from Avila, and no such form was included in the case file. Tr. 289.

Avila verbally informed Steben he earned $100 per day plus $500 to $700 in commissions at Mel O Dee Ice Cream. Tr. 628. In her backpay calculations, Steben averaged the two amounts to arrive at $600 in commissions. Tr. 210-212. However, Avila stated there were days when he earned more than $700 in commission. Tr. 628-629. In fact, there were weeks when Avila earned more than $1,000 in commissions. Tr. 629. Avila never submitted any documentation to Steben regarding his earnings at Helados La Tapatia or Mel O Dee Ice Cream. Tr. 628.

Importantly, Steben admits she received no documents from Avila other than the Social Security form. Avila never produced his W-2 Forms from AT&T for Steben. Tr. 340. Moreover, Steben did not request those documents, nor any other documents, from AT&T. Tr. 341. Nor did Steben request W-2 Forms from Avila. Tr. 341. Avila confirmed he never submitted his W-2 Forms to Steben. Tr. 618. Avila further stated he never produced his W-2 Forms from 24 Hr Personnel Services, Inc., for Steben. Tr. 619.

Steben admitted that if she had received Avila's itemized wage statements from 24 HR Personnel and Helados la Tapatia, her backpay calculations would have changed. Tr. 327. Avila confirmed he submitted no documentation to Steben regarding his employment with Helados la Tapatia. Tr. 624. This is because both statements include earnings from the first two quarters of 2015, which would have increased the amount of his interim earnings listed for those quarters. Tr. 326-327.

7. <u>The Compliance Specification Calculations Are Unreasonable</u>.

The Compliance Specification calculations are unreasonable. In addition to the failure to elicit additional documents to verify Claimants' alleged search for work efforts and interim earnings, Steben made invalid assumptions in her calculations. For instance, Steben alleges she did not have comparable wage records from Respondent for the period of June 13, 2014, to February 6, 2015. Tr. 162; GC Ex. 1. Because of this, Steben took an average of Claimants' earnings in 2015 to estimate the missing pay periods. Tr. 163-164.

However, Steben later admitted that she could not recall if Respondent informed her that these documents were not produced because those pay periods had wages significantly lower than what Mares and Avila would have been earning, and thus were excluded from the comparable payroll documents. Tr. 325. In fact, Mr. Perfecto explained the reason these pay periods were missing was because, during the changes to the Perishable Sales Representative position, there were instances when a Perishable Sales Representative was on a leave or a vacation and someone else covered his route.

Respondent would assign an individual to that sales position on a temporary basis as a relief person. The relief person is not eligible for commission and thus generally earns less than a Sales Representative. Tr. 844. Since the wages earned by a relief person were not comparable to the wages earned by the regular Sales Representative, Respondent did not include pay periods

when a relief person was assigned to a route. Tr. 844. **Steben admitted that, based on this explanation, she would have excluded those pay periods because they were not comparable**. Tr. 325.

a) <u>Steben Used Formula One from the Compliance Case Handling Manual to Calculate Mares' Backpay Amount</u>.

To calculate the backpay amount, Steben relied on formula one from the Case Handling Manual, which is an average. Tr. 165. Steben took Mares' total amount of gross backpay and divided by 25 pay periods. Tr. 165-166. Steben's backpay calculations are on a quarterly basis. Tr. 152; GC Ex. 1. To calculate backpay, Steben relied upon documents Respondent provided from approximately one year prior to Claimants' termination, and documents of comparable salesmen provided by Respondent. Tr. 156; 158-159; GC Ex. 2, 3, 11 and 12. Steben relied on the comparable salesmen documents because Respondent had changed its routes and manner in which it paid employees. As such, the information contained in the comparable routes and pay are the routes Claimants would have driven had they remained with Respondent. Tr. 161-162.

Steben relied on the CHM for computing interim earnings. Tr. 171. To calculate Mares' interim earnings, Steben relied on Mares' W-2 forms **<u>only</u>**. Tr. 169; GC Ex. 5. To calculate Mares' alleged interim earnings, Steben took the amounts shown on his W-2 statements and divided each W-2 amount by four quarters. Tr. 171. Steben did this for each year. She did not rely on the interim earnings hourly rate listed by Mares in the NLRB Forms. Tr. 189.

Steben never requested a Social Security waiver form for Mares and instead only relied on his W-2 statements, even though the waiver is supposed to be sent with the initial compliance package. Tr. 190-191; 289. In fact, this form is formally sent out to claimants by the Compliance Officer assigned to the case, and it has become past practice to send it. Tr. 192. Steben also admits that many forms are sent in the initial compliance package for claimants to fill out.

(1) Mares' Interim Expenses Were Not Attributed to the Quarter in Which the Expenses Were Actually Incurred.

Steben did not attribute Mares' interim expenses to the quarters in which they were actually incurred. Steben's calculations of Mares' interim expenses include mileage that he incurred driving to search for work. Tr. 176; GC Ex. 6 and 7. The calculations also include the difference in mileage from commuting to Respondent and the additional mileage Mares drove to arrive at his interim employer, Pacific Foods. Tr. 176; GC Ex. 6 and 7. Steben relied on the NLRB Forms Mares filled out to calculate Mares' mileage expenses in 2016 for the calculations regarding years before. Tr. 176; GC Ex. 6. Steben never independently verified if Mares actually drove those miles or incurred those mileage expenses, nor did Steben even ask Avila if he actually drove to the employers listed. Tr. 307-309.

Importantly, Steben noted that expenses listed in each NLRB Form matter in terms of transferring the amount into the appropriate quarter for the Compliance Specification. Tr. 179. Mares did not record his expenses on the forms during the quarter he actually incurred them. Instead, Mares recorded his expenses from one form to the next without regard to when the expenses were incurred. Tr. 179. However, calculating interim expenses in this fashion may drastically affect the backpay amount owed by Respondent. As such, Steben's calculations are not accurate, credible, or reasonable.

Steben calculated mileage based on Mares' roundtrip mileage expenses multiplied by the GSA mileage rate for automobiles for that year. Tr. 180; 374. To determine mileage, Steben used Google maps to determine the distance between Mares' home address and the addresses Mares sent Steben for each location listed on the NLRB Form, including his interim employer Pacific Foods. Tr. 180-181; GC Ex. 8. Mares did not change residences during the backpay period. Tr. 181.

(2) Mares' Backpay Calculations Do Not Include the Additional Income He Received from His Tenant's Rent.

As described above, Mares received monthly rental payments from his tenant in the amount of $400. Tr. 1032-1033. Had this amount been included in the backpay period, it would have amounted to an additional $29,880 (74.7 months x $400) in income for Mares. However, Steben's calculations do not include this additional source of income. Tr. 1033.

b) Steben Used Formula 1 from the Compliance Case Handling Manual to Calculate Avila's Backpay Amount.

As with Mares, Steben used Formula 1 from the Compliance CHM to calculate Avila's backpay amount. Steben alleges Avila's backpay began with his employment end date, December 2, 2010, and ended on August 23, 2016, the date Avila had to respond to Respondent's unconditional offer of reinstatement. Tr. 193; GC Ex. 10. Steben calculated Avila's yearly gross earnings with Respondent, and divided it by the number of pay periods, to arrive at the average amount of earnings for Avila. Tr. 198. Steben used Avila's earnings with Respondent from one year prior to his termination, and the comparable salesmen's earnings records provided by Respondent, to determine Avila's gross backpay amount. Tr. 194-197; GC Ex. 11 and 12. Steben took the yearly amount from the comparables and divided it by the number of pay periods. Tr. 200-201. This is the same method used to calculate Mares' gross earnings using comparables provided by Respondent. Tr. 200-201.

Steben used the same formula one to calculate Avila's interim earnings as she did with Mares, described above. Tr. 193. Steben divided each year's alleged earnings by four quarters to arrive at the interim earnings used in the Compliance Specification. Tr. 204; GC Ex. 1 and 13.

Steben calculated Avila's expenses the same way she calculated Mares' expenses. Steben focused on the mileage Avila incurred searching for interim employment, and the difference in mileage he drove when driving to Respondent and to his various interim employers. Tr. 215-216.

Steben relied on the NLRB Forms created in 2016 regarding conduct years earlier to determine the places Avila allegedly drove to in his search for work efforts. Despite this, Steben never independently verified if Avila actually drove those miles or incurred those mileage expenses, nor did she even ask Avila if he actually drove to the employers listed. Tr. 307-309.

Avila provided Steben with a list of addresses of each employer he worked at or drove to in search of employment. Steben used Google maps to calculate the distance to each, and used the government GSA website for the automobile mileage rate. Tr. 216; 373; GC Ex. 15 and 16. Avila changed his residence address during the backpay period, so Steben based the mileage expenses using his two addresses. Tr. 216-217; GC Ex. 16. According to Avila, his address changed when he worked for LA Corr, Helados la Tapatia and Mel O Dee. Tr. 218; GC Ex. 16. However, Avila admitted his address actually changed twice during the backpay period, one time for one week. However, this change in mileage was not calculated into the Compliance Specification. The only expenses calculated for Avila and Mares were mileage expenses. Tr. 336-337.

Moreover, Avila never notified Steben of the multiple leaves of absence he took while he worked at AT&T. Tr. 617. Avila never submitted any documentation to Steben regarding his leaves, either. Tr. 617-618. The Compliance Specification does not include or account for the leaves Avila took during the backpay period and is thus inaccurate.

c) <u>Despite Avila Informing Steben that He Left His Job at AT&T, Steben Did Not Cut Off His Backpay</u>.

Although Avila verbally told Steben he left his position at AT&T, Steben did not cut off his backpay or confirm with AT&T why he left work. Tr. 226; 339. Steben accepted Avila's claims without any investigation, and agreed with his descriptions without question. However, at the Hearing, Steben admitted she was unaware Avila abandoned his job at AT&T and that he had

not provided any explanation to AT&T for his abandonment. Tr. 316. Steben had not known this because she never contacted AT&T regarding Avila's employment.

(1) Steben Never Verified Avila's Alleged Reasons for Abandoning His Position with AT&T nor Did She Seek Any Documentation Relating to Avila's Employment With AT&T.

Furthermore, according to the NLRB Forms, Avila indicated he was not searching for interim employment during his employment with AT&T. Tr. 312. Steben agreed that Avila had a duty to search for interim employment if he believed he was not working a comparable job. Tr. 313. Yet, Avila indicated he was not searching for work, and did not list any reason prohibiting him from doing so (such as a disability, military service, medical accident, etc.). Tr. 313-314. Steben confirmed Avila never informed her how much money he earned at AT&T, or that he was eligible for incentive sales bonuses and many other benefits, such as vacation time; paid time off; medical, dental and vision insurance; and a 401K plan, among other things. Tr. 729; 1136. Nor did he provide her with any documents relating to his employment with AT&T. Tr. 339-340. Steben relied only on Avila's verbal statements and Avila's Social Security form summary statement. Tr. 340; GC Ex. 13. Those records do not indicate who Avila's employers were or any money from other sources which did not report wages to the government. Tr. 346.

Moreover, Steben alleged she generally reviews "job duties, the rate of pay, the benefits, [and] the distance that [Claimant is] driving" to determine whether jobs are comparable. Tr. 378. Yet, **Steben repeatedly confirmed she did not seek or review any documents from Claimants that would provide most of this information, including job duties, rates of pay, and benefits.** Nonetheless, and without relying on the foregoing documents, Steben alleges she did not consider AT&T to be comparable employment. Tr. 378. Accordingly, Steben did not cut off Avila's

backpay once he left AT&T, simply because Avila claimed it was not the same type of job and was more onerous than his work with Respondent. Tr. 227.

Steben contends Avila's main duty was driving a truck, and at AT&T he instead sat in an office taking phone calls, which, pursuant to Avila and Steben, made AT&T an incomparable position. Tr. 379. However, Steben took no other factors into consideration, relying exclusively on Avila's uncontested assertions. Again, she reviewed no documents regarding Avila's work at AT&T, nor contacted anyone at AT&T regarding Avila's claims. Steben's investigation was ridiculously deficient and not in accordance with NRLB requirements. Clearly, backpay should have been cut off once Avila abandoned his job at AT&T, or alternatively, the backpay amount should have been adjusted to account for Avila's unreasonable job abandonment.

(2) Steben Admitted She Did Not Know That Avila Was Terminated From LA Corr Because She Never Investigated Avila's Employment There.

Steben also testified that Avila informed her that he left LA Corr because he was not "making the type of money he was told that he would make." Tr. 229. Steben was unaware Avila was fired from his job at LA Corr. Tr. 316. This is because Steben never contacted LA Corr regarding Avila's employment. Tr. 316. Avila testified under oath he was terminated by LA Corr. Tr. 621-622; Res. 30.

Nonetheless, Steben made the same unsupported conclusion she did with AT&T, finding that Avila's job duties at LA Corr were not comparable to those at Respondent, because at LA Corr Avila worked in a warehouse and received less pay. Tr. 379. Steben did not conduct an investigation into Avila's termination from LA Corr.

(3) Steben Never Knew Avila Worked at Macy's.

Avila never reported his work at Macy's to Steben. In fact, it was not until after the Compliance Specification had been issued and the Compliance Hearing initiated that Avila

admitted to Steben he had worked at Macy's. Tr. 317. Avila never provided any documentation to Steben regarding his work at Macy's. Tr. 317-318. Because of Avila's willful concealment, there are employers that Steben did not know Avila worked for, including Macy's and 24 HR Personnel Service. Tr. 345-346. Steben thus did not include the wages Avila reported for Macy's in the amended Compliance Specification. Tr. 381. These are the only employers we know about. The IRS Report indicates additional wages Avila received, but Avila has not produced any documents revealing the source(s) of these wages. This is likely because Avila concealed interim earnings and did want to produce documents that would identify these additional sources of income.

However, without undertaking the slightest analysis, Steben flatly stated that Avila's work at Macy's was not comparable to that he performed at Respondent because his job duties at Macy's were "much different" from those at Respondent, although she offered no examples or explanations of any differences. She also said Avila allegedly earned less at Macy's. Tr. 379. In reality, her lack of elaboration about the alleged differences in job duties is likely because Steben spent only a few minutes talking with Avila about his employment at Macy's right before the start of the Compliance Hearing and after the Compliance Specification had been issued. Tr. 399.

d) Steben Never Discussed Avila's Assertion That He Served As a Promoter for the Band El Conjunto Rebelde.

Steben never discussed Avila's MySpace page with him, including his assertions that he was a band promoter making up to $75,000 and had disappeared to Mexico for six months. Tr. 358-360. **However, Steben admits that if Avila had left the country for six months, this could have impacted his backpay amount**. Tr. 360. Avila's stated income of up to $75,000 was not included as part of the backpay calculations.

Later in her testimony, after a series of leading questions by CGC, Steben contradicted her prior testimony by alleging she spoke with Avila regarding his trip to Mexico, which she claimed Avila told her occurred while he worked for AT&T and only involved an absence of two weeks. Tr. 391. However, Steben admitted Avila never produced any documents to support his assertion that he was on a leave when he allegedly went to Mexico for just two weeks. Tr. 400-401. Steben also could not remember how long Avila's first trip to Mexico supposedly lasted. Tr. 401.

e) Steben Admitted the Mileage Expense Calculations Are Not Accurate.

Steben admitted that the mileage expenses are not accurate. This is because the calculations do not take into consideration holidays, leaves of absence, or days off taken by each Claimant. Tr. 370. Every work day, whether a holiday or a day Claimant did not work, was counted towards the alleged mileage expenses incurred by Claimants. Tr. 370. Steben did not review Claimants' attendance records in calculating mileage expenses. Tr. 370.

f) Steben Did Not Include Any of the Settlement Amounts Mares and Avila Received from Respondent in the Compliance Specification.

Steben did not include the $5,000 settlement Avila received from Respondent in the Compliance Specification. Tr. 353-354; Res. 17 and 18. Avila received and cashed the $5,000 check. Tr. 634. Avila also never told Steben he received additional money as a result of the class action lawsuit against Respondent, without signing a release. Tr. 357.

Steben also did not include the $25,000 settlement Mares received from Respondent as part of the backpay calculation. Tr. 345; Res. 14. Mares also never told Steben he received additional money as a result of the class action with Respondent, without signing a release. Tr. 357. Steben, without explanation, simply stated that the Region found the settlement agreements did not meet

Board requirements. However, she did not justify her reason for failing to offset backpay by the settlement funds.

g) Steben's Assertions That the Compliance Specification Should Include the Average Gross Income from Both the Driver and Sales Representative Is Disingenuous.

Steben's assertions that the Compliance Specification should include the average gross income from both the driver and sales representative is disingenuous. The job duties of the Driver position are not comparable to the job duties Claimants performed while at Respondent. Further, Respondent never withheld these documents from Steben. The Board never asked Respondent for these records after Respondent explained why they were not relevant. The Board never sent a follow-up letter or issued a subpoena.

Mr. Perfecto explained the change Respondent made to its business model that changed the Perishable Sales Representative position. In 2010, Respondent used a Direct Store Delivery ("DSD") method. Under this method, Perishable Sales Representatives both delivered inventory and engaged in sales. Tr. 833; Please see Section IV.C.3 for a discussion of the job duties of a Perishable Sales Representative. However, Respondent changed its business model on two occasions during the backpay period.

(1) The Presale Model.

In or about May 2012, Respondent moved away from the DSD model and went to a Presale Model. Tr. 838. Under the Presale Model, Sales Representatives perform the same sales duties as Perishable Sales Representatives. Tr. 838. However, they no longer deliver inventory, which is now performed by a different position. Tr. 838. To determine who became a Sales Representative under the Presale Model, Respondent reviewed employees' length of employment with Respondent. Those Perishable Sales Representatives who had been with Respondent the longest became a Sales Representative. Tr. 838. Perishable Sales Representatives employed for

a shorter period of time were demoted to Driver positions. Tr. 838-839. Additionally, Respondent considered the area that the Perishable Sales Representative had been servicing, in an attempt to accommodate the employee with the same area. Tr. 839.

Drivers earn less than Sales Representatives. Tr. 839. Drivers deliver pre-sold products along their routes. Tr. 859. Drivers also pick up payment from Respondent's customers. Tr. 859-860. Once their deliveries are completed, Drivers return to Respondent's warehouse and are done for the day. Tr. 860.

Under the Presale Model, Claimants would have qualified for the Sales Representative position. Tr. 840. The Sales Representative position was a better position than the Perishable Sales Representative because Sales Representatives no longer had to make deliveries, dressed nicer because they were no longer getting dirty, were able to drive their personal cars instead of Bobtail trucks, and no longer faced physical demands. Tr. 840. As such, the Sales Representative position was the more preferred position. Tr. 858. The Sales Representatives were eligible for commissions but no longer qualified for overtime compensation. Tr. 840-841; 860. Drivers were paid on an hourly basis. Tr. 841.

(2) <u>In 2015, Respondent Changed the Sales Representative Position to a Combo Sales Representative</u>.

In or about February 2015, Respondent modified its sales model again, so that Sales Representatives could sell both perishable and grocery items, unlike before, when Sales Representatives only sold one type of product. Tr. 841. This position was called Combo Sales Representative. Tr. 841. Combo Sales Representatives still drove their own vehicles and were not eligible for overtime. Tr. 841-842. Beginning in or about May 2012, both the Sales Representative and Combo Sales Representative received a gas allowance of $120 every two

weeks. Tr. 842; 845. Perishable Sales Representatives were not eligible for the allowance. Tr. 843.

(3) It Is Inappropriate to Include the Driver Payroll Records as Part of the Compliance Specification.

Steben asserts she would have altered her backpay calculations if she had received comparable payroll records from Respondent regarding the Driver position. Steben stated she would have combined payroll records from both the Driver and Sales Representative positions and averaged the amount to arrive at gross backpay. Tr. 954.

However, Respondent never notified the Board that it would not produce Driver payroll records. Rather, Respondent explained in its September 14, 2016, correspondence to the Board that producing payroll records for employees in positions that Claimants would not have occupied had they remained employed by Respondent was not relevant. GC Ex. 26. The Board never responded to Respondent's letter. Tr. 957. The Board never requested the Driver payroll records after it received Respondent's letter. Tr. 957. Furthermore, Steben admitted that if she had combined and averaged the lower-paying Driver wages with the higher-paying Sales Representative wages, the gross wages calculations would have been lower for Claimants. Tr. 959. Clearly, Steben's testimony about averaging the two positions was self-serving and untruthful.

H. Claimants Willfully Concealed Earnings and Failed to Fully Comply with Respondent's Subpoenas.

Throughout these proceedings, Claimants failed to fully comply with Respondent's subpoenas and the ALJ's Orders to comply with Respondent's subpoenas. Res. 1-2; 3; GC 1. As the Hearing continued, it became abundantly clear that even with CGC acting as Claimants' counsel and providing them guidance in responding to Respondent's subpoenas, Claimants willfully withheld responsive documents that were damaging to their cases. Avila admitted he met

with CGC after receiving Respondent's subpoena prior to the start of the Hearing. Tr. 1122-1123. In September 2017, after the Hearing commenced, Avila again met with CGC in person for further guidance in responding to Respondent's subpoena. Tr. 1123; 1127. Moreover, he again met with CGC for guidance in February 2018, about one week prior to the reopening of the record. Similarly, Mares admitted that he met and consulted with CGC in February 2018 at the NLRB's Regional Office to prepare a letter to Respondent's counsel regarding his document production. Tr. 1073-1074; Res. 57.

As a preliminary matter, Respondent served its subpoenas duces tecum upon each Claimant months in advance of the Hearing. Res. 1-2; 3. Mares had three (3) months to gather documents in response to the subpoenas served on his trucking company. Mares also had thirty (30) days to gather documents in response to the subpoena served on him individually. Similarly, Avila had thirty-three (33) days to gather documents in response to the subpoena served on him. As noted above, Claimants admitted to seeking guidance from CGC in responding to Respondent's subpoenas each time.

Although not required, Respondents took additional steps to remind Claimants of their obligation to produce documents. On July 24, 2017, weeks in advance of the Hearing, Respondent served follow-up letters and the Subpoenas to each Claimant explaining, in plain language, their obligations pursuant to the subpoenas duces tecum. Neither Claimant responded to the letters.

Furthermore, neither Claimant is new to litigation and the discovery process. Both have been or are lead plaintiffs in large, civil class actions against employers.

1. Claimants Failed to Make a Reasonable Effort to Comply with Respondent's Subpoenas.

Claimants did not even make a reasonable effort to comply with the subpoenas. On the first day of the Hearing, Mares produced only five (5) pages of documents in response to only one

of Respondent's three subpoenas duces tecum served on him. Avila did not produce any documents. Due to Claimants' failure to respond, Judge Thompson ("ALJ") issued an Order ordering Claimants to comply with Respondent's subpoenas and to produce all responsive documents by the second day of the Hearing. The proceedings were adjourned early that day. Thereafter, Claimants produced documents on a rolling basis but willfully withheld documents.

2. Claimants Produced Documents to CGC, But Not to Respondent.

Claimants produced documents to CGC, who then forwarded some, but not all, of the documents to Respondent, apparently to aide Claimants' case to the detriment of Respondent's due process rights. For instance, Mares at least twice produced documents to CGC, but not to Respondent, even though the documents were responsive to Respondent's subpoenas. GC Ex. 18; GC Ex. 20. CGC tried both times to introduce these documents into evidence even though they had never been produced to Respondent – neither by Mares nor by CGC. Further, both Claimants produced documents on a rolling basis, producing the documents to CGC but not to Respondent. In turn, CGC alleged she forwarded the documents to Respondent. However, Respondent believes there are additional documents Mares produced to CGC which were not produced to Respondent.

Avila even admitted that whatever documents he had, he gathered and produced to the Compliance Officer but not to Respondent. Tr. 26. In fact, Avila admitted that, while he submitted to the Board on the first day of the Hearing the fliers he obtained from allegedly attending various job fairs, he did not submit these documents to Respondents until the second day of the Hearing. Tr. 592-593. Further, it was not until Avila was served with Respondent's Motion for Expanded Sanctions that Avila produced a second resume he had stated he had in his possession but had failed to produce. When he finally produced this second resume, Avila produced it to CGC, not Respondent. Avila produced the resume on August 15th, eight days after the Hearing started and sanctions were already in place.

3. Claimants Never Produced Any Communications Between Them and the Region During the Entire Backpay Period.

Neither Claimant produced any communications between them and the Compliance Officers during the six-and-one-half years of the backpay period, even though these items were requested in Respondent's subpoenas. Tr. 1057. In response to Respondent's Request under Section 10650.5 of the Case Handling Manual for Compliance Proceedings, CGC admitted to only producing certain documents from the case file and withholding other documents. However, as demonstrated by the privilege log, Claimants exchanged various correspondences with the Board. Res. 6.

During the Hearing, two email correspondences were introduced by CGC. CGC Ex. 15 and 16. Avila never produced these email correspondences to Respondent. Avila did not produce any email correspondences or any other form of correspondence he had with the Compliance Officers regarding his interim employment and earnings over the six-and-one-half-year period. Mares produced no written communication between him and the Compliance Officers, nor any handwritten notes from any verbal communications.

Based on the production of the two email exchanges, it is clear that at least Avila engaged in email communications with the Compliance Officer regarding these topics. Further, it is doubtful that only two email communications exist between the parties, given the extraordinary length of the backpay period. In fact, during discussions regarding the privilege log created by CGC, there are multiple entries relating to email communications between Avila and the Compliance Officer. Tr. 90-92.

Respondent also maintains that, at the very minimum, the communications the Board sent to Claimants enclosing the NLRB Reports and the instructions on completing them should have been produced, plus the Board's initial and subsequent communication regarding backpay

obligations. Moreover, Claimants cannot justify their failure to produce these documents. The documents are not protected by any privilege.

4. Avila Willfully Withheld Responsive Documents and Failed to Produce All Documents Responsive to Respondent's Subpoena.

Avila failed to produce all documents responsive to Respondent's subpoena. On the second day of the Hearing, Avila produced some, but not all, of the documents responsive to Respondent's subpoena. The production was not organized by request but provided as an unorganized collection of documents. These documents included a limited time period of bank statements from various months during the backpay period (instead of statements from each month during the backpay period, as requested by the subpoena), five handouts regarding job openings allegedly obtained from two job fairs Avila attended over the course of six-and-one-half years, a partial production of W-2's for the year **2014 only**, federal income tax return forms for **2014 only**, complete payroll documents for one interim employer, partial payroll documents from another interim employer, and some documents from EDD relating to unemployment benefits Avila received during part of the backpay period. Avila never produced the remaining W-2's.

As part of Avila's rolling production, he produced a series of IRS Printouts. Res. 62. Comparing Avila's Social Security Form to the IRS Printouts, the amounts listed do not match for many of the years in the backpay period, as demonstrated by the above in Section IV.A.4. GC Ex. 13; Res. 62. In 2011, Avila's Social Security form indicated his income was $0. However, the detailed IRS printout states his income was over $24,000. Similarly, in 2012, Avila's Social Security form indicates he earned a little over $20,000. However, the IRS Printout shows Avila earned over $30,400. **In sum, the IRS Printout demonstrated that Avila earned $41,581 more than indicated on the Social Security Form.** GC Ex. 13; Res. 62.

It is apparent why Avila held on to these documents for as long as he could: the IRS Printout undeniably demonstrates that Avila concealed interim earnings and that the backpay calculations for him are grossly miscalculated. Additionally, the chart also demonstrates why Avila failed to produce any tax returns except for one year (2014). If revealed, the W-2's would specifically display to the Compliance Officer his various sources of income—both reported and unreported. As seen above, Avila does not want these figures revealed.

Furthermore, on the third day of the Hearing, Avila produced some documents responsive to Respondent's subpoena, which included additional bank statements from the backpay period but not all statements for the entire period. Even coupled with the statements previously produced, Avila had not produced all bank statements for the backpay period as required by the subpoena.

With regard to Avila's second resume, he only produced that resume to CGC after being served via email with Respondent's Motion for Expanded Sanctions. Respondent's Motion for Expanded Sanctions was served on Avila at 11:44 a.m. At 4:36 p.m., CGC sent Avila's second resume, which he had produced to CGC that afternoon. As with the IRS Printout, once Avila produced the second resume it became evident why he withheld it as long as he did.

As described above in detail, Avila repeatedly maintained that his job with Respondent was simply that of a driver and that he was not in a sales position, to strengthen his argument for abandoning his position at AT&T by alleging AT&T was not comparable to his position with Respondent. Avila can thereby allege his backpay should not be cut off or otherwise reduced.

However, in the second resume, Avila repeatedly listed his profession as "sales." Avila listed almost all positions as "sales" positions. In fact, **Avila listed his position with Respondent as "Salesman"** even though throughout the Hearing he alleged he was only a "driver."

Furthermore, the failure to produce this document is nothing short of willful. Avila cannot in good faith claim he did not have access to his own resumes to justify his failure to produce them.

Importantly, after the Hearing reopened and the evidentiary sanctions were lifted, Avila brazenly admitted to possessing still more resumes he had never produced to Respondent. Avila explained that after each job that [he] got, [he] updated" his resume. Tr. 1115. During the backpay period, Respondent is aware of at least five occasions on which Avila changed his job (*e.g.*, AT&T, LA Corr, Macy's, Helados La Tapatia, and Mel O Dee Ice Cream). However, Avila produced only two resumes in response to Respondent's subpoena. Res. 35 and 53. Furthermore, while Avila alleges he applied to "numerous jobs" on Indeed.com, he only produced the resume he uploaded to Indeed.com. Tr. 1117. That is, Avila did not produce any other documents relating to his alleged search for work efforts on Indeed.com. Tr. 1117-1118.

Incredibly, to justify his failure to produce his records of his job search efforts using Indeed.com, including employers he applied to and communications with the employers, Avila stated he was unaware he could print documents from Indeed.com. Tr. 1118. Avila's testimony is not credible, especially in light of the fact he had printed his resume from the Indeed.com website. Res. 53. Avila lied on the record.

Additionally, during many of his explanations as to why he had not produced responsive documents, Avila indicated the ease with which he could obtain these documents, stating he simply needed to ask various institutions for copies of the items requested in the subpoenas. See Tr. 25; 28. Nonetheless, Avila failed to produce the responsive documents. Avila failed to produce his tax returns for each year in the backpay period, his W-2 Forms for all interim employers in the backpay period, and his complete payroll records from his interim employers, among other things. Avila's failure to produce payroll records is even more egregious given California Labor Code

section 226(c), which requires employers to provide employees payroll records within 21 days of a request.

Avila repeatedly engaged in one-sided production throughout these proceedings, and even by his own admission his conduct is not demonstrative of an individual who engaged in a good-faith effort to search for documents and comply with Respondent's subpoena. Rather, Avila's conduct demonstrated a willful and total disregard of the process.

5. Mares Willfully Withheld Responsive Documents and Failed to Produce All Documents Responsive to Respondent's Subpoena.

Mares also willfully withheld responsive documents and did not produce all responsive documents. As a preliminary matter, Mares stated he understood he was supposed to provide documents in response to Respondent's subpoena but failed to fully do so. Tr. 415. Mares repeatedly spoke with CGC regarding his document production and CGC instructed Mares on how to respond to Respondent's subpoenas. Tr. 415. Mares met with CGC in advance of the Hearing and again prior to the record reopening. Mares admitted that he met and consulted with CGC at the NLRB's Regional Office to prepare a letter to Respondent's counsel regarding his document production. Tr. 1073-1074; Res. 57. Yet, Mares failed to fully comply with the subpoenas.

As part of his rolling production, Mares produced a copy of a resume. The resume listed an interim employer Mares had not previously disclosed to the Compliance Officer: Nature's Own. Res. 22. Mares never indicated he worked for Nature's Own on any of the NLRB Forms he filled out. Because Mares was concealing an interim employer, he sought to withhold the resume from Respondent to prevent damaging his own case.

Furthermore, Mares at least twice produced documents to CGC, but not to Respondent, even though the documents were responsive to Respondent's subpoenas. CGC attempted to move into evidence a document produced by Mares to CGC that was never produced to Respondent.

The document was a photocopy of a membership card Mares possessed from Work Source, an organization that assists individuals in seeking employment. GC Ex. 18. The document was responsive to Request Numbers 15 and 16 in Respondent's subpoena served on Mares as an individual. Res. 1. Nonetheless, the document was never produced to Respondent – not by Mares and not by CGC prior to the hearing. This is especially troubling given the admission that CGC assisted Claimants throughout these proceedings in responding to Respondent's subpoenas.

CGC once again attempted to introduce documents Mares had produced to CGC but not Respondent. CGC attempted to introduce documents relating to Mares' trucking company and a Social Security claim and police report for fraud that Mares had filed with these entities about his trucking company. Mares produced the documents to CGC the morning of August 14th. Mares never produced the documents to Respondent, even though they were responsive to Respondents' Requests Numbers 11 and 12 in the subpoena served on Mares' trucking Company. Res. 2.

Notably, Mares originally alleged he never owned a trucking company, which was why he did not produce any responsive documents to that subpoena. Tr. 413. However, Mares later contradicted his testimony and admitted he did have a trucking company, and produced the photograph of the truck. GC Ex. 21. Mares then alleged he no longer operates the business. Tr. 413-415. As such, he did not produce any documents responsive to Respondent's subpoena directed at his trucking company.

At no time during the Hearing did Mares produce any communications between him and the Compliance Officers regarding his interim employment and earnings during the six-and-one-half-year backpay period. Mares did not even produce the letters the Compliance Officers sent him regarding his obligations to maintain accurate records of his search for work efforts. Those documents were requested in Respondent's subpoenas.

Mares gathered some documents responsive to Respondent's subpoena requests, but produced them only to CGC. Mares was able and willing to produce documents to support his own case, but refused to comply with Respondent's subpoenas and the ALJ's order to produce responsive documents to Respondent.

As mentioned above, Mares produced documents on a rolling basis. On the first day of trial, Mares produced only five pages' worth of documents in response to only one of Respondent's subpoenas. The documents produced were certain W-2's issued to Mares. Aside from these pages, no other documents were produced by Mares on the first day. On the second day of the Hearing, Mares produced additional documents responsive to Respondent's subpoena served on Mares individually. The supplemental production was also and still is an incomplete production. As with Avila, Mares' production was not organized by request and was provided in a stack of documents. These documents included bank statements, tax return documents for two years, payroll documents from one interim employer, and some documents from EDD relating to unemployment benefits Mares received during part of the backpay period.

On the third day of the Hearing, Mares produced one document in response to the subpoenas served on his trucking company: a photograph of the front of a truck purportedly used in his trucking company. Aside from this photograph, no other documents were produced in response to these subpoenas.

Mares did not produce any additional documents in response to Respondent's subpoenas for another 20 days, when Mares produced 6 pages of documents to CGC. Among the documents was a letter explaining his error in reporting a fraud claim to the Social Security Administration. He included supporting documentation from the Social Security Administration regarding these communications. Mares also produced two pages regarding an interim driver license. At no point

in time since the subpoenas were issued did Mares contact Respondent regarding the subpoenas or his ability to comply with the subpoenas. Tr. 414.

I. CGC Repeatedly Acted and Served as Counsel for Claimants.

During the Hearing, CGC acted as Claimants' counsel by repeatedly making representations to the ALJ of Claimants' alleged efforts to comply with Respondent's subpoenas and communicating with Claimants about the subpoenas. Tr. 76, 132, 888. CGC could not have known about Claimants' efforts unless CGC was communicating with Claimants regarding the subpoenas and the case. As revealed during the Hearing, CGC was in fact acting as Claimants' counsel, counseling Claimants on how to respond to Respondent's subpoenas.

Mares admitted CGC stopped the conversation between him and Respondent's counsel regarding the subpoenas, and instructed him to go into the hearing room so that the conversation could be held in front of the judge. Tr. 534-535.

1. Claimants Repeatedly Met with CGC, Who Explained to Claimants How to Respond to Respondent's Subpoenas.

Both Claimants admitted to meeting CGC in her offices for guidance on how to respond to Respondent's subpoenas. Mares admitted that he met and consulted with CGC at the NLRB's Regional Office to prepare a letter to Respondent's counsel regarding his document production. Tr. 1073-1074; Res. 57. Even with CGC's advice, Mares did not respond truthfully to Respondent's subpoena. For instance, in response to Request 21, which asks for documents relating to "any funds or payment" Mares received from the backpay period "pursuant to a settlement agreement to resolve threatened or alleged claims made by or on [Mares'] behalf," Mares stated "I have no documents." Res. 1; Res. 59. However, during his testimony Mares admitted this statement was not true. Tr. 1075-1076. Mares received payments from settlements reached with employers, including Respondent. Tr. 1076-1077. Mares thus again attempted to

conceal interim earnings. Mares continued to willfully withhold documents and conceal earnings throughout the proceedings.

Avila also admitted meeting with CGC for counsel on how to respond to Respondent's subpoena. Tr. 1119. In fact, Avila explained that he consulted with CGC and went through each specific request listed in Respondent's subpoena to prepare a response to the subpoena. Tr. 1119. While Avila attempted to claim he created his response to Respondent's subpoena without incorporating CGC's suggestions, after further questioning from the ALJ, Avila admitted he did incorporate CGC's guidance in responding to Respondent's subpoena. Tr. 1122; Res. 59.

More egregious, **Avila admitted he met with CGC after receiving Respondent's subpoena prior to the start of the Hearing**. Tr. 1122-1123. CGC answered Avila's questions about the subpoena. Tr. 1123. CGC described the documents Avila needed to produce in response to the subpoena. Tr. 1125. To justify his failure to produce documents on the first day of the Hearing, Avila stated he did not receive the subpoena until two weeks prior to the commencement of the Hearing because the subpoena was sent to his parents' address. Tr. 1125. Avila maintained that in two weeks' time he was unable to produce even a single document on the first day of the Hearing. Tr. 1125. Avila justified his failure to gather documents in two weeks versus his subsequent ability to gather documents in half a day, with the excuse that he had a day off the second time. Tr. 1125.

Contrary to Avila's excuse, many of the documents he produced on the second day of the Hearing would not have required him to visit places (*i.e.*, banks) that might be closed if he got off late from work. For instance, on the second day of the Hearing, Avila produced fliers from job fairs he allegedly attended during the backpay period, his tax returns, and partial payroll documents from two interim employers. Tr. 1126.

In September 2017, after the Hearing had commenced, Avila again met with CGC in person for further guidance in responding to Respondent's subpoena. Tr. 1123; 1127. Moreover, he again met with CGC for guidance in February 2018, about one week prior to the reopening of the record. Tr. 1127. During this meeting, Avila asked CGC to clarify what the subpoena was requesting in terms of the communications it sought, which CGC did. Tr. 1128-1129.

Even with the additional time to respond, Avila admitted he produced his tax returns for 2014 only. Tr. 1130. Avila admitted he had not produced bank statements for the period March 2011 to July 2011, or from January 2015 to August 2015. Tr. 1131. Avila also admitted he never produced bank statements for 2012, 2013, and 2016. Tr. 1131. Avila further admitted he understood he only partially produced payroll records from some interim employers. He claimed he had no additional documents to produce. Tr. 1136. Avila also failed to produce any documents relating to his efforts to secure a loan he received from Fidelity. Tr. 1141. In sum, therefore, CGC acted as Claimants' counsel throughout the proceedings.

V. ARGUMENT.

Claimants are not entitled to backpay. Claimants willfully concealed interim earnings throughout the backpay period. Avila repeatedly willfully withheld responsive documents to Respondent's subpoenas. The reasons became clear. With each rolling production, Avila produced a document that damaged his case. He produced his resume where he listed his position with Respondent as a "Salesman," contrary to his repeated assertions that he was merely a "driver." He also produced an IRS Printout that indicated Avila had earned over $41,000 in earnings that were not included in the Social Security form and not reported to the Board.

Furthermore, Avila's concealment was aided by the Compliance Officer who failed to properly investigate the case and repeatedly contradicted herself on the stand. Ultimately, the

Compliance Officer admitted she did not conduct a reasonable investigation into Claimants' interim employment and earnings. For instance, the Compliance Officer based almost the entirety of her calculations on verbal statements from Avila and a one-page Social Security form he provided to her. The Compliance Officer did not contact any of Avila's interim employers, even after he informed her he was no longer working with those employers. Nor did the Compliance Officer obtain any documentation from any of Avila's interim employers. Based on the totality of the circumstances, an adverse inference should be drawn against Avila that he concealed interim earnings throughout the backpay period and that backpay should be denied.

Similarly, Mares withheld responsive documents throughout the proceedings from Respondent and the Board. Mares produced a resume indicating he worked for an interim employer, Nature's Own, that he never reported to the Compliance Officer. Mares also failed to produce bank statements from the only time period he alleged to have worked for Nature's Own.

Moreover, both Mares and Avila admitted to receiving and filling in the NLRB Forms in 2016 for the entire six-and-one-half-year backpay period. Both Mares and Avila admitted they had no supporting documents to justify the entries they made on the NLRB Forms since these forms were the only records they maintained related to their search efforts. As such, the NLRB Forms are not credible or accurate. Claimants' failure to maintain an adequate record of their search efforts, interim employers, and interim earnings all indicate Claimants went to great lengths to conceal their lack of searching for work and their interim earnings.

Additionally, Claimants did not make reasonable efforts to search for interim employment. As described above, Claimants applied for work approximately 1.25 times on average per month. More egregious is that during the backpay period, Claimants could have easily applied to multiple employers online, looked for jobs online, through a computer or even through their cell phones.

This would have required minimal effort, yet Claimants refused to conduct a reasonable search for work. Mares admits to posting his resume to social media, but his NLRB Forms indicate he never submitted an online application, while Avila's forms indicate he did so only ten times in the entire backpay period. As detailed below, backpay should be denied.

A. Claimants' Willful Concealment of Interim Earnings Bars Any Backpay Recovery; Alternatively, Backpay Should Be Tolled During the Quarters When Claimants Concealed Interim Earnings.

Mares and Avila willfully and repeatedly concealed interim earnings. See Section IV.A. Board precedent is clear: where, as is the case here, concealed earnings cannot be attributed to any particular quarter, the claimant receives no backpay at all. American Pac. Concrete Pipe Co., 290 NLRB 623, n.4 (1988). Moreover, a claimant who conceals interim earnings from the NLRB receives no backpay for **any** quarter in which the claimant engaged in the concealed employment. City Disposal Sys., Inc., 290 NLRB 413, 418, enforced sub nom., Brown v. NLRB, 134 894 F.2d 1336 (6th Cir. 1990).

Notably, in American Navigation Co., 268 NLRB 426 (1983), the Board went to great lengths to explain the appropriateness of barring backpay when a claimant conceals interim earnings to effectuate the goals of the Act:

> Thus, it is clear that a discriminatee is not automatically entitled to an award of full backpay by virtue of his illegal discharge. The question of whether this remedy should be awarded depends upon our determination that such an award is necessary to effectuate the policies of the Act. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Thus, our decision to deny backpay, wholly or partially, cannot reasonably be construed to be a "penalty" that is inconsistent with the nonpunitive nature of the Act. As the Ninth Circuit noted in Flite Chief, 640 F.2d at 992, "Calling it a penalty, or a remedy, or a diminution or a set off, or an abatement is not the test. The test is does it effectuate the policies of the Act."

Id. As demonstrated below, barring backpay because Claimants willfully concealed interim earnings is warranted.

1. Avila Concealed Interim Earnings from Multiple Employers Throughout the Backpay Period, Some of Which Cannot Be Attributed to Any One Specific Quarter.

Avila concealed earnings from multiple interim employers throughout the backpay period, including earnings which cannot be attributed to any particular quarter. For instance, based on the IRS Printouts, Avila earned more than $41,000, but we do not know from where or when.

Avila also worked as a promoter for the band El Conjunto Rebelde, during which time he earned between $60,000 and $75,000. Tr. 648; Res. 19(a). He voluntarily listed this information on his public MySpace page. Res. 19(a). Avila unconvincingly attempted to deny he worked as a promoter. Tr. 697-698.

At no point during his denial did Avila explain when he listed this profession, and why he never removed it from his MySpace page if it was not true. As described above, this is because it is highly likely Avila did serve as a promoter and earned this income. See V.A.5.a. As demonstrated by the Compliance Specification, Avila failed to disclose his earnings as a band promoter. Since it is unclear how long Avila remained a band promoter, his income from this time cannot be attributed to any one (or more) specific quarters. See American Navigation Co., 268 NLRB 426 (1983); City Disposal Systems, Inc., 290 NRLB 413 (1988).

Similarly, Avila admitted working for his father's company, Avila's Pressure Washer, and not reporting his income to the NLRB. Tr. 627. Avila admitted he did so throughout the backpay period but never indicated when. Avila's earnings from this time cannot be attributed to specific quarters. Consequently, under Board precedent backpay must be denied for Avila.

Additionally, Avila had multiple cash deposits made into his bank accounts, almost all of which Avila alleged he was unable to account for. He could not remember the source of these deposits and whether they were from an interim employer. Tr. 654. None of these cash deposits were reported to the NLRB. Tr. 654. These deposits occurred throughout the backpay period.

Alternatively, backpay must be tolled for the quarters in which it is evident Avila concealed interim earnings. As seen by the chart described above, Avila's Social Security form indicated his income was $0. However, the detailed IRS Printout listed over $24,000. Similarly, in 2012, Avila's Social Security form indicates he earned a little over $20,000. However, the IRS Printout shows Avila earned over $30,400. The IRS Printout demonstrated that Avila earned $41,581 more than indicated on the Social Security Form. GC Ex. 13; Res. 62. Based on IRS Printout, Avila concealed earnings in 2010, 2011, 2012, and 2015. Backpay must be tolled for these years.

The IRS Printout does not indicate the source of the monies. Avila willfully failed to produce his full tax returns which would identify the various sources of income. Moreover, Avila never testified to why there was a difference. Yet, CGC alleges the difference between the IRS Printout and the Social Security form are from the Unemployment Insurance benefits Avila received during the backpay period. See CGC Post-Hearing Brief to the Administrative Law Judge, p. 13, fn. 9. This is completely inappropriate. There is no testimony or other evidence in the record regarding the source of these monies and CGC may not theorize as to the source of Avila's concealed earnings since she intentionally did not ask Avila about the difference.

Although speculative, it reasonably can be concluded that Avila's position as a band promoter occurred throughout at least 2011. Avila admitted he was using MySpace in 2011, and his MySpace home page at that time highlighted his occupation as a band promoter and listed his income related thereto. Tr. 649. Thus, at the very minimum, backpay should be cut off, or alternatively, tolled for at least all four quarters of 2011. Furthermore, Avila testified he worked at Avila's Pressure Washer three times per year. Tr. 572-573. As such, at a minimum, backpay should be tolled for at least three quarters for each year of the backpay period. Additionally, Avila admitted he worked at Macy's in or about November 2014. Tr. 564; 566. As such, no backpay

for the fourth quarter of 2014 should be awarded. See American Navigation Co., 268 NLRB 426 (1983); Performance Friction Corporation, 335 NLRB 1117 (2001).

a) Avila Withheld Producing His Full Tax Return Documents and Instead Only Produced His Social Security Summaries, Which Include Numerous Inconsistencies, Indicating Avila Withheld Interim Earnings.

In addition to the above, Avila intentionally withheld producing to the Board or Respondent his full tax return documents or his W-2 forms, and instead produced only a cursory one-page Social Security form he printed from the internet. Not only does the Social Security form fail to specify the sources of Avila's alleged interim earnings, but it is also inconsistent with Avila's IRS Printouts, as described above. As demonstrated above, Avila chose to produce his Social Security form instead of his more detailed income documents in an effort to conceal his interim earnings.

Furthermore, the Board has held that where Social Security records are at odds with a claimant's testimony regarding interim earnings, the Social Security records shall be controlling. Domsey Trading, 351 NLRB 824, 833 (2007); CHM section 10660.5. Since the amounts listed in the Social Security form differ from the amounts listed in the IRS Printouts, it strongly suggests Avila was attempting to conceal tax fraud from at least one arm of the federal government. In other words, Avila's concealment was intentional, not inadvertent. See Cibao Meat Prods., 348 NLRB 47 (2006). Thus, if it is determined that backpay will not be cut off for the entire backpay period then it must be cut off for 2010, 2011, 2012, and 2015. Alternatively, backpay must be tolled for at least these years, where the values listed in the Compliance Specification and the values listed in the IRS Printout do not match.

Moreover, Avila repeatedly failed to fully comply with Respondent's subpoena and produce documents specifying his interim earnings. Avila failed to produce W-2 forms for the

entire backpay period, failed to produce federal income tax return forms for the entire backpay period, and failed to produce payroll documents for all of his alleged interim employers. That is, Avila failed to produce any documents that would specifically indicate all of his sources of income. There can be only one reason for these failures: to conceal interim earnings.

Avila's concealment of his payroll records from interim employers becomes even more evident when California's broad labor laws are taken into consideration. For example, Labor Code 226(c) permits a current or former employee to receive a copy of their payroll records from their current or former employer within 21 days of requesting them. Pursuant to California Labor Code section 1198.5, every current and former employee has the right to inspect and receive a copy of their personnel records. The employer must make these documents available to the employee within 30 calendar days from the date the employer receives a written request. Yet, Avila only produced complete payroll records from one interim employer, and only partial payroll records from only one other interim employer. Based on California law, Avila could have easily provided payroll records and personnel files to the Compliance Officer and Respondent. Avila willfully decided not to.

2. Mares Concealed Interim Earnings from Multiple Employers Throughout the Backpay Period, Including Rental Payments He Received Throughout the Backpay Period, Thus Barring Backpay Recovery.

Mares concealed interim earnings he received from multiple employers throughout the backpay period, including rental payments he received throughout the backpay period, thereby barring any backpay recovery. It was not until Mares testified during these proceedings that he admitted he received $400 in monthly rental payments during the backpay period, and that these payments were never disclosed to the Compliance Officer. Tr. 1033.

Further, Mares only disclosed the rental payments at the Hearing because Respondent specifically identified various cash payments deposited in Mares' bank account. Mares was unable to account for almost all of the deposits, aside from the rental payments. Tr. 527-528. None of the cash payments was reported to the Board. Tr. 520-521. Mares admitting receiving the rental payments every month. He cannot claim his failure to report these earnings was simple inadvertence. Mares willfully deceived the Board. See American Navigation Co., 268 326 (1983). Even assuming, arguendo, that Mares' admission of the rental payments was an eleventh-hour confession, backpay is still denied. Id. Since these payments can easily be traced to monthly occurrences during every month of the backpay period, no backpay is due Mares. Performance Friction Corporation, 335 NLRB 1117 (2001) (backpay is denied for all quarters in which a claimant intentionally conceals interim employment).

Additionally, Mares received interim earnings from his own trucking company. Mares contradicted his own testimony regarding the operation of his trucking company, first by alleging he never had such a company; later, Mares admitted he did own a trucking company, and suddenly was able to produce a photo of a truck used in his business. GC Ex. 21. Even Steben admitted she did not know if Mares operated the trucking company during the backpay period. Tr. 174. Mares' refusal to disclose the dates and amounts earned from his trucking company, together with the various, unaccounted cash deposits, require the finding that backpay be denied.

Mares also refused to provide any documentation regarding his employment with Nature's Own. Instead, Mares alleged that he never worked there. However, his contentions are not believable. During the Hearing, Mares produced his bank statements for every month during the backpay period except for the time period he worked for Nature's Own. Mares did not produce bank statements for August 2010 to November 2010. This was intentional. Additionally, Mares

indicated he worked at Nature's Own on two separate resumes. Mares prepared a second resume after he was working at Pacific Foods. Res. 22. In this second resume, Mares continues to list his employment with Nature's Own and added extra details about his employment with Nature's Own, specifying the job duties he held there. Res. 22. If, as Mares alleges, Nature's Own was falsely listed on his resume solely to increase his chances of employment, then once he obtained employment with Pacific Foods he would have removed Nature's Own from his resume, not include new details about his job duties there. Mares' concealment requires backpay be cut off.

a) Alternatively, Backpay Must Be Denied for the Period During Which Mares Concealed His Employment and Earnings from Nature's Own.

Alternatively, backpay must be tolled for the period when Mares worked for Nature's Own. It is undisputed Mares worked at Nature's Own after his employment with Respondent ended. He repeatedly listed Nature's Own on his various resumes. Res. 10 and 21. Most disconcerting, Mares produced his bank statements from every month in the backpay period except for the five months during which he worked for Nature's Own. Tr. 1052. Since Mares worked for Nature's Own in between his employment with Respondent and Pacific Foods, backpay, at a minimum, must be tolled for this period. See American Navigation Co., 268 NLRB 426 (1983); Performance Friction Corporation, 335 NLRB 1117 (2001).

B. Claimants Did Not Engage In Reasonable Efforts to Seek and to Hold Interim Employment, and CGC Did Not Meet Her Burden to Demonstrate Otherwise.

Respondent clearly demonstrated that Mares and Avila failed to make reasonable efforts to seek and keep interim employment, and CGC failed to meet her burden to rebut Respondent's testimony. As such, backpay recovery must be denied.

Claimants must mitigate their damages by making reasonable efforts during the backpay period to seek and to hold interim employment. Consequently, a claimant is not due backpay for

any period within the backpay period during which the claimant failed to make a reasonable effort to mitigate. Gimrock Construction, 356 NLRB 529 (2011); CHM section 10558.1. Once Respondent raised the job search defense and produced evidence that there were substantially equivalent jobs in the relevant geographic area available to Claimants during the backpay period, the burden shifted to the CGC to produce evidence demonstrating the reasonableness of Claimants' job search efforts and of maintaining interim employment. St. George Warehouse, 351 NLRB 961 (2007). CGC failed to meet this burden.

In St. George Warehouse, 351 NLRB 961 (2007), the respondent called a vocational employability specialist, who conducted a labor market study in the New Jersey area to determine the availability of jobs for the positions the claimants had held with respondent. The vocational specialist examined published sources, such as the Dictionary of Occupational Titles, Occupational Employment Statistics, Projections 2008, and New Jersey Employment and Population in the 21st Century, and want ads in local newspapers. The vocational specialist also performed an analysis of the transferability of job skills. Id. at 961. Based on her analysis, the vocational specialist determined that a sufficient number of comparable jobs were advertised as open and available during the backpay period. Notably, the vocational specialist had not interviewed claimants. Id. at 962. The respondent argued that once it asserted a significant number of comparable jobs were available in the relevant market, the burden shifted to the General Counsel to establish that claimants had made reasonable efforts to find work. The Board agreed.

Here, Respondent's expert witness demonstrated through ample evidence and analysis that a substantial number of comparable jobs were available and that Claimants failed to adequately search for jobs. Recall, **Respondent's expert witness conducted a specific labor market investigation**. CGC failed to offer expert testimony to challenge Respondent's expert. Therefore,

CGC failed to meet her burden in demonstrating Claimants made a reasonable search effort. As such, the findings of the Respondent's expert witness must be taken as true. Once it is established that a Claimant failed to make an adequate search for work during some portion of the backpay period, the Board will deny all backpay for the period during which the Claimant failed to seek work. See Continental Ins. Co., 289 NLRB 579 (1988); Heinrich Motors, Inc., 166 NLRB 783, 791-792 (1967), enforced 403 F.2d 145 (2d Cir. 1968). As demonstrated by the following subsections, CGC failed to meet this burden.

Additionally, Mares unjustifiably limited the types of jobs he applied for, and remained employed at an interim employer doing work not comparable to that he performed when he was employed by Respondent. During that time, Mares failed to look or apply for any jobs. Similarly, Avila failed to adequately hold interim employment. Avila unreasonably abandoned interim employment at one employer and was terminated from interim employment by another. Unquestionably, Mares and Avila did not make reasonable efforts to search for interim employment.

1. Respondent's Expert Witness Demonstrated There Were Substantially Equivalent Jobs in the Relevant Geographic Area Available to Claimants.

In the present case, Respondent's expert witness demonstrated there were substantially equivalent available jobs where Claimants lived, as described in detail above in Section IV.B. Ms. Hagen's analysis indicated that in Los Angeles County there were over 9,000 sales route driver jobs in 2011 and almost 11,000 in 2012. Res. 47. Ms. Hagen looked for job openings for a sales route driver and contacted a sample of employers in 2016 to inquire about qualifications, salary, and how often employers hire for this position. Tr. 781. Ms. Hagen was able to speak with eight employers regarding their sales route driver positions. Tr. 782. Ms. Hagen also reviewed statistical data for the labor market regarding Claimants' job position. Based on the availability

of jobs in Claimants' area, Ms. Hagen's expert opinion was that Mares and Avila should have found comparable work within 4.75 months after their employment with Respondent ended if they made reasonable efforts to search for work. Res. 50 and 51. As demonstrated below, this was not the case.

2. Claimants' Failure to Submit an Adequate Number of Applications Indicates Willful Idleness.

Board precedent is clear that claimants who fail to engage in adequate search for work efforts by actively applying for available jobs have not made a reasonable effort to mitigate. This includes failing to submit an adequate number of applications. In Grosvenor Resort, 350 NLRB 1197, 1198 (2007), the Board considered the number of applications filed, the period of time between the applications, and the period of time between the applications and the starting date of interim work to determine whether a claimant made a reasonable search for interim employment. Id. at 1201. The Board found that a claimant who submitted one application in a two-month period did not perform a reasonable job search in an area where jobs were readily available. Id. Importantly, the Court specifically noted that while the claimant stated he applied to "other places" in addition to those listed in his Search for Work Report, this assertion, even if credited, was too vague to support a finding that the claimant had searched for more work than listed. Id.

The Board further found that another claimant "conducted an insufficient search by applying to only three employers in approximately three months." Id. at 1202. **The Board also found "one application per month insufficient" as a search for interim employment**. Id. Submitting only two applications in two months was also found to be insufficient. Id. Backpay was tolled during this period. See also Contractor Servs. Inc., 351 NLRB 33 (2007) (finding that the claimant failed to make "an honest and good-faith effort" to obtain interim employment because, in addition to claimant's unjustified restrictions in the types of employers contacted,

claimant also contacted fewer than one employer per month, applied with only 23 employers during a 46-month backpay period, and in 7 quarters of the backpay period, made no applications for work at all).

Additionally, Claimants did not make any effort to take advantage of the technological advances that occurred during the backpay period to search for work. Claimants could have easily applied to multiple employers online, through a computer or even through their cell phones. This would have required minimal effort, yet Claimants failed to utilize technology in their search efforts in any meaningful way. The Board's case law regarding search efforts predates the technological advances made. As such, the case law the does not take into account these new avenues to search for work and the ease with which individuals may search for work. Here, Claimants used online resources but their willful idleness is magnified by how easily they could have conducted a reasonable search.

Here, just as in Grosvenor Resort, both Claimants failed to adequately search for work. The NLRB Forms are not credible since both Claimants completed the forms in 2016 regarding the six-and-one-half-year backpay period. Even if the forms are credible, the NLRB Forms indicated that Mares contacted **less than one employer per month** in his search for work efforts during the backpay period. Tr. 790-791; GC Ex. 6. Avila contacted **only one-and-one-half employers per month** in his search for work efforts. Tr. 790-791; GC Ex. 14. Claimants' NLRB Forms included many duplicate contacts of employers. Tr. 790; GC Ex. 6 and 14. As demonstrated by Grosvenor Resort, these submissions do not indicate reasonable search efforts. CGC thus failed to demonstrate that Claimants made a reasonable effort to mitigate, even if the forms are credited as accurate, which they are not, so backpay must be denied, or in the alternative, denied for the periods when Claimants failed to conduct a reasonable search for interim

employment. See also American Bottling Company, 116 NLRB 13030 (1956) ("It is our view that a condition precedent to any award of back pay is due diligence on the part of the discharged employee to find other work").

3. Avila's Lengthy Period of Unemployment Indicates a Failure to Mitigate.

The Board has found long periods of unemployment to be evidence of a claimant's failure to mitigate. Avila was unemployed for almost two years before he found his first job. In Midwest Hanger Co., 221 NLRB 911, 925 (1975), the Board adopted the ALJ's ruling, holding that a claimant who had been unemployed for three-and-one-half years had not engaged in reasonable efforts to search for work. The Board discredited the claimant's testimony that she looked for work 2 or 3 weeks of every month, and 2 or 3 days in each of those weeks, at various similar employers. Noting that claimant resided in a large metropolitan area with a great number of plants, stores, and offices, the Board found that, while securing a job is not always easy, claimant should have been able to find a job within three-and-one-half years. This was especially true given that other claimants involved in the case had been able to secure employment within that time. Id. at 925. As such, backpay was tolled during this period.

Here, Avila remained unemployed for almost two years after his employment with Respondent ended. Tr. 550. While he alleges he made a diligent effort to search for interim employment, the credible evidence states he did not. Rather, it appears Avila waited until his unemployment benefits were scheduled to end before returning to work. Tr. 553. Respondent's expert witness' opinion corroborated this conclusion, noting that Avila was able to find employment only once his unemployment benefits were to end. Tr. 791. Avila's lack of reasonable effort is further highlighted when compared to Mares' ready success. Mares was able

to secure work almost immediately with Nature's Own, and then again, five months later, with Pacific Food. Tr. 429; Res. 10 and 21.

4. Mares' Unreasonable Delay in Searching for Work Tolls Backpay.

Mares' unreasonable delay in beginning his search for work tolls backpay. In Grosvenor Resort, 350 NLRB 1197, 1198 (2007), the Board found:

> [A] discriminatee's unreasonable delay in commencing an initial search for interim work will not be excused simply because he or she thereafter diligently seeks work. If the discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, and will commence it if and when a reasonably diligent search begins.

Consequently, the longest period of total initial job search inactivity the Board has found permissible is two weeks. Id. at 1199. In Grosvenor Resort, the Board held neither age, limited skills and education, nor limited transportation justified a claimant's failure to search for work at all for any periods of time beyond the first two weeks. Id. Here, Mares stopped looking for comparable work in January 2011 through August 2016. Mares' refusal to search for comparable work from 2011 to 2016 mandates that backpay be tolled. Alternatively, Mares did not begin his search for employment until July 2, 2010, one month after his termination. GC Ex. 6. Backpay must thus be tolled until July 2, 2010 at a minimum.

5. The Receipt of Unemployment Benefits Does Not Necessarily Indicate Claimants Made Reasonable Efforts to Locate Work.

The receipt of unemployment benefits does not necessarily indicate Claimants made reasonable efforts to locate work. In Continental Insurance Company, 289 NLRB 579 (1988), the Board found that although a claimant collected Unemployment Insurance benefits and visited several unemployment agencies, claimant did not engage in a reasonable effort to search for work. The Board found that comments claimant made about retiring, his subsequent acceptance of retirement benefits, the lack of evidence that claimant applied for jobs, and claimant's failure to

follow up on job offers, demonstrated that claimant did not mitigate any backpay owed to him. Id. at 580-581.

The present case is analogous. Avila received unemployment benefits for almost a two-year period. During that period, Avila contacted only one-and-one-half employers per month in his search for work efforts. Tr. 790-791; GC Ex. 14. Avila was unable to find even part-time work during that period. GC Ex. 14. Avila failed to take even minimal steps towards securing employment until his benefits were coming to an end. Only at that time was he finally able to secure employment. Thus, when all the facts are taken together, it is clear that simply receiving unemployment benefits is not indicative of a reasonable search for work in this.

6. Avila's Backpay Must Be Cut Off from the Date He Unreasonably Quit Working for AT&T; Alternatively, Respondent's Backpay Liability Should Be Offset by the Difference Between Avila's Earnings from AT&T and Later Employers.

Avila's backpay must be cut off from the date he unreasonably quit working for AT&T. Alternatively, Respondent's backpay liability should be reduced by the difference between Avila's earnings from AT&T and later employers. When a claimant unreasonably refuses or quits an interim job during the backpay period, especially one which pays much or more than the claimant would have received from the employer who unlawfully discharged him, the claimant may be deemed to have engaged in a willful loss of earnings in derogation of the claimant's duty to mitigate damages. Big Three Industrial Gas & Equipment Co., 263 NLRB 1189 (1982); Florence Printing Co., 158 NLRB 775, 791-92 (1966).

When a claimant voluntarily quits – or as is the case here, abandons – comparable interim employment, the burden shifts from the respondent to the CGC to show that the decision to quit was reasonable. See Big Three Industrial Gas & Equipment Co., 263 NLRB 1189, 1199 (1982); First Transit, 350 NLRB 825, 826 (2007); Minette Mills, Inc., 316 NLRB 1009, 1010 (1995). CGC

did not meet this burden because, as seen below, Avila's action to abandon his position with AT&T was not reasonable.

Here, Avila's alleged reasons for abandoning his position at AT&T contradicted each other and were far from reasonable. Avila alleged he abandoned AT&T because his department was going to close; there was a point system in place tracking his tardies and absences; and that allegedly caused him stress. Avila then contradicted this statement by admitting that at the time he abandoned his job with AT&T, he was no longer concerned about his attendance points because the points were falling off already. Tr. 616. Furthermore, Avila testified he would be subject to discipline for attendance at every other interim employer and while working at Respondent's, if he or other employees were late to work, just as at AT&T. Tr. 601-602.

Board precedent has repeatedly held that quitting a job for reasons relating to work schedule, attendance, or travel to work is not justified. In Parts Depot, Inc., 348 NLRB 152, 154 (2006), the Board found a willful loss where a claimant alleged "it was hard trying to get there with the vehicle [claimant] had at the time." See also Knickerbocker Plastic Co., 132 NLRB 1209, 1213 (1961), (holding that work schedule and time required for transportation are not justifiable reasons for quitting).

Furthermore, prior to abandoning his position, Avila took no other action to attempt to complain about his concerns or file a grievance through his union. He never sought the aid of his union, he never filed a grievance, and he never filed a complaint. Tr. 733-734. Avila did not even attempt to search for a different job before abandoning his position with AT&T. GC Ex. 14.

Undoubtedly, such conduct cannot be considered reasonable. Board precedent agrees. In Big Three Industrial Gas & Equipment Co., the Board found that a claimant who did not get along with his supervisor, but took no action to attempt to remedy the situation other than to quit his job,

acted unreasonably, and that backpay was extinguished by his quitting. 263 NLRB at 1199. As discussed above, Avila took no action when he alleged he was under stress. Instead, he simply abandoned his well-paying job without attempting to line up another job. Avila's actions are particularly unreasonable given the extraordinary benefits he received at AT&T (*e.g.*, vacation time; paid time off; medical, dental and vision insurance; a 401K plan; bonuses; awards; etc.), especially since he did not receive comparable benefits at any subsequent interim employer. Tr. 729; 1136-1137; see also Section IV.E., supra.

Moreover, CGC failed to demonstrate that Avila's job duties at AT&T were incomparable to his job duties with Respondent, to justify his job abandonment. In fact, the overwhelming evidence establishes that Avila's sales duties at AT&T were highly comparable to his sales duties at Respondent's (and at almost every subsequent interim employer after AT&T). As described in detail in IV.C.2, Avila was a "Salesman" at all of his pre and post Respondent jobs (*e.g.*, taking customer orders, preparing sales invoices, taking orders of products, selling as much product as possible, etc.). Tr. 577-578. At AT&T, Avila made sales and earned an hourly rate plus incentive pay, just as he did with Respondent. Tr. 598; 728. Further, the Compliance Officer stated that Avila had a duty to search for interim employment if he believed he was not working a comparable job, which he did not do. Tr. 313.

CGC failed to demonstrate that Avila's job duties at AT&T were "substantially more onerous or . . . unsuitable or threaten[ed] to become so." Lundy Packing Co., 286 NLRB 141, 144 (1987), enforced, 856 F.2d 627 (4th Cir. 1989). If anything, the testimony proved Avila's job duties at AT&T were less strenuous than with Respondent. Rather than driving a truck around and trying to make sales in the field, Avila worked an office job at AT&T. Tr. 379; 840. Avila also worked less hours at AT&T than at Respondent's. Tr. 569.

In sum, Avila abandoned his position with AT&T, a job comparable to the one he held with Respondent, and CGC failed to demonstrate that Avila's conduct was reasonable. See Medline Industries, 261 NLRB 1329, 1335 (1982), (finding that claimant incurred willful loss by abruptly quitting his job with no alternative employment secured, and that claimant's "propensity" to quit interim employment is a relevant factor to consider in determining reasonableness); Shell Oil Company, 218 NLRB 87, 89 (1975), (holding that claimant's "voluntary cessation of gainful work in the slender hope of securing preferred survey employment, with undenied overtones that leisure rather than labor would afford financial advantage, marks the action as willful loss of earnings deemed to reduce further backpay by the measure of nonmitigation.").

Based on the above, backpay should be cut off from the date Avila unreasonably abandoned his job with AT&T. Alternatively, if backpay is not cut off, Respondent maintains backpay must be offset as provided for in Knickerbocker Plastics Co., Inc., 132 NLRB 1209 (1961):

> We further find that, as a result of such quitting, each of these claimants shall be deemed to have earned for the remainder of the period for which each is awarded backpay the hourly wage being earned at the time such quitting occurred. Therefore, an offset computed on the appropriate rate per hour will be deducted as interim earnings from the gross backpay of each of these claimants. This offset shall be made applicable from the date of the unjustified quitting throughout the remainder of the backpay period for each particular claimant. In this connection, where the claimant has secured other employment during the time that the offset is applicable, and if, on a quarterly basis, she earned a greater amount than the offset, the offset will not be applied, but the actual interim earnings will be deducted from gross backpay. If she earned less than the offset at employment secured subsequent to the quitting, also on a quarterly basis, the amount of the offset will be applied.

Id. at 1215. Here, backpay must be offset by the amount Avila earned at AT&T until he secured interim employment earning more than he did at AT&T (*i.e.,* until Avila began his employment with Helados La Tapatia in June 2015).

7. Backpay Must Be Tolled During the Periods When Avila Took Various Leaves of Absence.

Backpay must be tolled for the various times Avila took a leave of absence from AT&T. Back pay is tolled for a claimant who has been unable to work due to illness or injury. CHM Section 10544.4. In American Manufacturing Co. of Texas, 167 NLRB 520 (1967), the Board explained its practice of tolling backpay when a claimant is unavailable to work due to illness:

> The origins and causes of infections and organic infirmities, such as influenza and heart attacks, for example, are usually not known and cannot be determined or assumed. It is ordinarily reasonable to assume, however, that absences from work because of such illnesses would probably have occurred even if the employee had not been discharged. As the claimant's loss therefore cannot be said to have a likely relationship to the unlawful discrimination, disallowance of backpay for all periods of unavailability because of such illnesses is proper. Not only does this approach appear equitable in view of the impossibility of reconstructing a possible cause, but it also affords simplicity of administration in an area which would otherwise be confused and difficult.

Id. at 522. Here, Avila's reasons for taking FMLA leave were unrelated to his employment with Respondent: the birth of his son and alleged stress he experienced at AT&T. Tr. 594; 609; 611; 736. Neither reason relates to his employment with Respondent. Accordingly, backpay must be tolled from February 2013 to May 2013 when Avila took baby bonding leave, and for the five days Avila took a leave under the Family Medical Leave Act in September and October 2014.

8. Avila's Backpay Must Be Tolled When He Was in Mexico for Six Months Not Looking for Work.

Under Board precedent, backpay must be tolled when a claimant is out of the country and not looking for work. In L'Ermitage Hotel, a case with an almost identical set of facts to the present case, the Board affirmed an ALJ decision mitigating backpay for the six (6) months a claimant was in Mexico, despite the claimant being eligible for backpay before and after that period. 293 NLRB 924 (1989). In its holding, the Board relied on the fact that the claimant did

not appear to search for work during that time. The Board tolled backpay until the claimant returned. Interestingly, in the same holding, the Board also tolled the backpay clock for another claimant for the time she spent away from home but within the United States, in Oregon, where she accompanied her father. In tolling backpay, the Board ruled that the trip was made for the father's business, not the claimant's, and that the claimant neither searched for work nor was available for work during that time.

Here, as in L'Ermitage Hotel, Avila went to Mexico for a six-month period. Res. 19(a). Avila publicly announced his absence on his MySpace page, specifically commenting on MySpace that he had not "been here in a while [*sic*]," and then immediately after posted, "over 6 months lol." Res. 19(a). Further, Avila posted multiple photos of himself in Mexico and admitted to posting the photos in 2011. Tr. 649. Moreover, the Compliance Officer admitted that while she did not talk to Avila about his being in Mexico for six months, if he had gone, it would have impacted his backpay amount. Tr. 358-360. Avila never produced any documentation to confirm he was not in Mexico; he instead simply verbally denied he was there. Further, Avila contradicted his testimony about when he posted the photos of himself in Mexico, further casting doubt as to the veracity of his denials. Tr. 649; 700. The evidence demonstrates Avila was in Mexico and backpay accordingly should be tolled from January 2011 to June 2011.

9. Avila's Backpay Must Be Cut Off from the Date He Was Terminated from LA Corr for His Misconduct; Alternatively, Avila's Earnings from LA Corr Must Be Imputed Until He Found a Better-Paying Job.

It is undisputed Avila was terminated from LA Corr for his misconduct. As such, backpay should be suspended from the date he was terminated in March 2015. In the alternative, Avila's earnings from LA Corr must be imputed until he found a better-paying job. Under Board precedent, a discharge from interim employment constitutes a willful loss when the claimant engaged in misconduct. In other words, the Board will find "a willful failure to maintain suitable

interim employment," constituting a "disqualification from backpay to the extent of such failed mitigation," when a claimant has engaged in misconduct. Associated Grocers, 295 NLRB 806, 830 (1989).

Here, Avila attempted to mislead the Board by alleging he resigned from LA Corr because he had previously applied to Helados La Tapatia and been offered a job there. Tr. 569. However, Avila later admitted he actually had been terminated by LA Corr for missing work. Tr. 621-622; Res. 30. In other words, Avila's termination was a direct result of his misconduct. Consequently, backpay must be cut off or, alternatively, imputed until he began working with Helados La Tapatia.

10. Mares Unduly Limited the Type of Potential Employer He Contacted and Declined to Seek the Type of Work He Did for Respondent, Constituting a Failure to Mitigate.

Mares unjustifiably limited the type of potential employer he contacted and declined to seek the type of work he did for Respondent, *i.e.*, that of sales route driver. Under Board precedent, such conduct constitutes a failure to mitigate. In Heinrich Motors, Inc., 166 NLRB 783, 791-792, enforced, 403 F.2d 145 (2nd Cir. 1968), the Board found that a claimant mechanic sustained a willful loss by seeking work only at gas stations rather than also with auto dealerships. The Board explained that because of claimant's long experience as a mechanic, he was aware of "the wide difference in wages paid to mechanics by service stations and by car agencies." Id. at 791. Since the claimant unduly limited his search, the Board found claimant had not made a good-faith effort to secure employment, and the CGC had not proved otherwise. As such, claimant was not entitled to backpay for this period.

Here, Mares unjustifiably limited his search for interim employment to only driver positions, even though his position with Respondent was that of a sales route driver. Mares repeatedly attempted to characterize his duties with Respondent as that of only a driver, but ultimately admitted that he routinely engaged in sales activity as part of his job duties with

Respondent. Tr. 479-480; 482-483. In fact, Mares specifically listed his ability to perform "sales" on multiple resumes. Res. 10 and 22. Mares should not have limited his search to only driver positions. Further, once he secured employment with Pacific Foods as a driver, Mares should have continued to search for interim employment as a route sales driver. He failed to do so. GC Ex. 6. Notably, CGC failed to demonstrate that Mares' conduct in limiting his search efforts was justified. Consequently, just like the mechanic in Heinrich Motors, Inc., Mares failed to mitigate and is not entitled to backpay for the period during which he worked for Pacific Foods and did not search for interim employment from January 1, 2011, until the end of the backpay period.

C. Adverse Inferences Should Be Drawn Against Both Claimants for Their Failure to Fully Comply with Respondent's Subpoenas and Their Willful Refusal to Produce Responsive Documents.

Adverse inferences should be drawn against both Claimants for their failure to fully comply with Respondent's subpoenas and their willful refusal to produce responsive documents. Claimants repeatedly willfully refused to fully comply with Respondent's subpoenas. Mares had three (3) months to gather documents in response to the subpoenas served on his trucking company, and thirty (30) days to gather documents in response to the subpoena served on him individually. Avila had thirty-three (33) days to gather documents in response to the subpoena served on him. Nonetheless, Claimants arrived at the Hearing with minimal documents (Mares) or no documents (Avila). At no point in time did Claimants reach out to Respondent's counsel to clarify what documents were sought or to explain the nonexistence of documents. This is true even though Respondent's counsel is bilingual and could have communicated with Claimants in English or Spanish. Instead, Claimants chose not to ask any questions about the subpoenas to Respondent's counsel. Claimants never communicated with Respondent's counsel even after Respondent's counsel sent an additional letter explaining Claimants' subpoena obligations in plain terms.

Worse still, Claimants admitted that once they received Respondent's subpoenas, they met with CGC in person at the Region to review the subpoenas. CGC, covertly acting with Claimants, counseled Claimants on how to respond to Respondent's subpoenas to the point where CGC assisted each Claimant in preparing a written response to Respondent regarding the subpoenas. Tr. 1073-1077; 1122; Res. 57 and 59. Even after being advised on how to respond to the subpoenas by CGC, who was effectively acting as Claimants' attorneys, Claimants ignored their obligations to Respondent and these proceedings, and withheld documents that were responsive to the subpoenas and damaging to their cases.

CGC also overtly acted as Claimants' counsel during these proceedings by instructing Claimants not to speak with Respondent, by relaying document production from Claimants to Respondent, by relaying Claimants' questions about subpoena production, and by making representations on behalf of Claimants as to the completeness of their document production.

CGC also tried to make broad statements on the record that Claimants produced all responsive documents, but the record shows they did not. Notwithstanding the above legal assistance, Claimants repeatedly and willfully failed to comply with Respondent's subpoenas and the Judge's Order. Claimants only produced documents partially responsive to Respondent's subpoena request, and have done so only when it benefited them rather than complying with the subpoena's deadline or the ALJ's Order. Furthermore, Claimants have repeatedly engaged in one-sided production, gathering and producing documents to CGC and/or the Compliance Officer, but failing to do the same pursuant to Respondent's subpoenas. Claimants' actions, with the assistance of CGC, effectively prevented Respondent from being able to fully defend its case. Based on Claimants' conduct, the ALJ should draw an adverse inference against **each Claimant that he has**

not engaged in a reasonable effort to search for interim employment and that each Claimant has concealed interim earnings.

1. Claimants Engaged in Egregious Conduct After the Original Evidentiary Sanctions Were in Place.

Prior to the Board's ruling on CGC's Special Appeal, when the ALJ's evidentiary sanctions against Claimants were in effect, Claimants persisted in engaging in egregious conduct by failing to fully respond to Respondent's subpoenas. "The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance." McAllister Towing & Transp. Co., 341 NLRB 394, 396 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). The authority to sanction a party for noncompliance with a Board subpoena is a matter committed in the first instance to the judge's discretion. Id. at 396; Teamsters Local 917 (Peerless Importers), 345 NLRB 1010, 1011 (2005). In fact, in some instances sanctions are appropriate where a party simply delayed disclosing responsive documents and the delay caused prejudice to a party's case. Station Casinos, LLC, 358 NLRB 1556, 1569 (2012), (Board affirms evidentiary sanctions imposed by judge who struck the testimony of four witnesses for whom the charging party made late subpoena disclosures, causing prejudice).

Here, Claimants repeatedly and willfully refused to comply with Respondent's subpoena even after admitting they were in possession of responsive documents and after sanctions had already been imposed. The reason for their refusal was clear: the documents contained negative information that hurt Claimants' case. Consequently, Claimants withheld production of these items until they felt forced to turn to them over.

For instance, after the ALJ's sanctions had been imposed, Avila admitted to only partially producing documents even though he had additional responsive documents in his possession. Avila produced only one of multiple resumes used in his search for employment efforts. Tr. 709-

710; Res. 53. Avila had no justification for not producing a document that was entirely within his possession. Of course, Avila's justification for withholding the document was clear: his resume repeatedly listed his primary job duties at his places of interim employment as "sales." As explained above, Avila went to great lengths to deny he engaged in sales duties at Respondent.

2. An Adverse Inference Should Be Drawn Even Though Claimants Partially Produced Documents Because Partial Production Does Not Alleviate Claimants of Their Responsibilities to Fully Comply with the Subpoenas.

An adverse inference must still be drawn even though Claimants partially produced documents because partial production does not alleviate Claimants of their responsibilities to fully comply with the subpoenas. In Metro West Ambulance Service, 360 NLRB No. 124, slip op. at 2 (2014), the Board found it appropriate to draw an adverse inference against a respondent who produced some but not all of the relevant accident reports sought by the General Counsel's subpoena. Similarly, in McAllister Towing & Transportation, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386, 388 (2nd Cir. 2005), the Board upheld the ALJ's evidentiary sanctions against the respondent for failing to substantially comply with the subpoenas upon issuance of the ALJ's order partially denying its petition to revoke on the first day of the hearing. In short, partial compliance does not satisfy a party's subpoena obligation.

In Essex Valley Visiting Nurses Association, 352 NLRB 427 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012), the ALJ drew an adverse inference supporting the General Counsel's allegation of single-employer status because of the respondent's failure to produce subpoenaed documents in a backpay proceeding. In Essex Valley, the General Counsel issued three subpoenas requesting a variety of documents relating to the General Counsel's allegation that the respondent and two other entities were a single employer. The respondent filed a petition to revoke, which was denied.

On the first day of the hearing, the respondent produced only some of the documents called for in the subpoenas. The hearing was adjourned and General Counsel sent a letter to the respondent asking that responsive documents be produced when trial resumed about a week later.

When trial resumed, the respondent produced additional, but not all, of the documents sought by the subpoena. The respondent also failed to produce the custodian of records and instead had a subordinate testify in her place. Due to the respondent's failure to comply with the subpoenas, General Counsel asked for evidentiary sanctions against the respondent. The respondent, however, argued that because it had "substantially complied" with the subpoenas, the sanctions were unwarranted. The ALJ and the Board disagreed.

The ALJ found that the respondent failed to meet its subpoena obligations. The custodian of records' subordinate admitted he failed to search for all documents responsive to the subpoenas. The General Counsel argued that because the respondent failed to produce a witness to fully testify to the method and extent of its document production, it was appropriate for the ALJ to infer that such testimony and documents would have revealed the existence of evidence which would not be supportive of the respondent's contentions (*i.e.*, that the companies were not a single employer). Id. at 439.

The ALJ agreed, finding that the respondent failed to produce the documents sought and by the designated deadline, even though the subpoenas had been in the possession of the respondent well in advance of trial. Id. at 440. The ALJ further found that because the respondent failed to produce documents reflecting the organizational structure of each entity, as requested in the subpoenas, it was appropriate to draw the adverse inference that such documents would confirm there was common management among the entities during the relevant period. Id. at 440-441. The ALJ thus found the entities to be a single employer. The Board affirmed the ALJ's

adverse inference. This reasoning especially applies to cases such as the present one where Claimants' partial production was not the result of good-faith efforts to comply with the subpoenas, but to conceal damaging documents.

Here, Claimants never fully complied with Respondent's subpoenas. This was true even though CGC acted as Claimants' counsel throughout the entire subpoena process, guiding them on how to respond. Claimants' conduct is nothing short of willful noncompliance, and adverse inferences are warranted. With each partial production it became more evident why certain documents were being withheld: the documents did not simply hurt Claimants' case, but in fact demonstrated Claimants were concealing interim earnings. Avila only produced one federal income tax return, for the year 2014, and a partial production of W-2's for 2014. No other detailed sources of income were produced.

On the eve of the Hearing re-opening, Avila produced additional documents, including the series of IRS Printouts discussed above. Comparing Avila's Social Security Form to the IRS Printouts, the amounts listed do not match for many of the years in the backpay period. GC Ex. 13; Res. 62. In fact, the amounts listed on Avila's Social Security Form were significantly lower than in the IRS Printout, demonstrating Avila concealed earnings.

Similarly, Mares' partial production included his bank statements from every month during the backpay period, except for the five months that he worked for Nature's Own. Again, the failure to produce these documents is clear: Mares wanted to conceal his earnings from Nature's Own. Mares also failed to produce any documents relating to his trucking company, aside from the photo of a truck. Notably, Mares originally denied ever having a trucking company. Later, he admitted he did and produced the single photo. Tr. 413-415; GC Ex. 21. Undoubtedly, Claimants' conduct in responding to Respondent's subpoenas has not been in good faith. Rather, it has been

obfuscation to the end. In such a circumstance, the ALJ should draw an adverse inference against **each Claimant that he has not engaged in a reasonable effort to search for interim employment, and that each Claimant has concealed interim earnings**. The credible evidence in the record established Avila lied, deceived, and willfully concealed interim earnings. Unequivocally, an adverse inference should be drawn against Avila that he willfully concealed interim earnings and did not search for interim employment. Avila's conduct was egregious.

D. The Release Agreements Signed by Claimants Are Valid, Meet the *Independent Stave* Factors, and Bar Claimants from Receiving Any Backpay.

The non-Board release agreements signed by Claimants are valid and meet the standards of Independent Stave Co., 287 NLRB 740 (1987). In Independent Stave, the Board acknowledged its policy of encouraging settlement agreements and established a non-exclusive list of factors to consider:

- Whether the terms are reasonable in light of the violations, the uncertainty inherent in litigation, and the current stage of litigation.
- Whether all parties, including the respondent, the charging party, and all affected employees agree to be bound by the settlement.
- Whether there is any indication that agreement was reached through coercion, fraud, or duress.
- Whether there is any respondent history of violations or breach of previous unfair labor practice settlement agreements.

Id. at 743.

1. Mares' Backpay Claims Were Released When He Signed the Compromise and Release Agreement.

The Workers' Compensation Compromise and Release Agreement ("C&R") signed by Mares meets the above standards. The parties entered into the C&R after extensive litigation had occurred in the Workers' Compensation case. (The last date of injury was listed as November 1, 2009.) Desiring to conclude because of the ongoing uncertainty involving litigation, both Mares

and Respondent agreed to settle the case for $25,000. Tr. 845-846; Res. 14. In fact, **Mares explicitly stated he released his claims against Respondent because he no longer wanted to return to work with Respondent and wanted to remain working at Pacific Foods.** Tr. 514-515. Further, the settlement was reached after ongoing negotiations between Mares' and Respondent's attorneys. That is, both parties were represented and Mares even had an interpreter present to review the C&R with him. Tr. 513. Lastly, Respondent has no history of violations or breaches of previous settlement agreements. Since the C&R complies with the terms of the Independent Stave factors, and in conjunction with Mares' explicit intention not to return to work with Respondent, the Board should find Mares is not entitled to backpay. Alternatively, if the Board finds Mares is entitled to backpay, then backpay should be cut off from August 15, 2012, forward.

Furthermore, although the Board "discounts" employee statements indicating an unwillingness to accept reinstatement, this case should be a clear exception. Heinrich Motors, Inc., 166 NLRB 783 (1967). Here, the parties clearly spent ample time negotiating the C&R. This obviously was not a quick discussion in which individuals may make statements in the heat of the moment. Thus, as the Board in its pre-Heinrich holdings found special significance was given when employees told a Board agent during an investigation they would not accept reinstatement, and therefore had their backpay cut off effective from the date of that declaration, so should Mares' backpay be cut off from the date he made the same declaration expressing his own intention not to return to work. Mares similarly indicated he made this statement clear to his attorney when he entered into the C&R: he released his employment claims because he did not want to return to work for Respondent. Mares specifically checked the "employment" box stating he did not want to return to work at Respondent. See English Freight Company, 67 NLRB 643 (1946); Tr. 514-

515. As such, backpay should be cut off from when Mares made his intention clear that he would not accept reinstatement.

Alternatively, the amount of the C&R should be deducted from Respondent's backpay liability because the payments reflect a replacement of lost wages. See American Mfg. Co. of Texas, 167 NLRB 520 (1967), (finding that to the extent Workmen's Compensation payments reflected "replacement of lost wages" they must be included with interim earnings); see also Baker v. California Shipbuilding Corporation, 73 F. Supp. 322 (S.D. Cal. 1947), (applying analogous reasoning to credit the amount paid under a settlement and release termed "not legally binding" to adjust plaintiffs' recovery in a Fair Labor Standards Act case).

2. Avila's Backpay Claims Were Released When He Signed the Settlement Agreement and General Release with Respondent.

Similarly, Avila released his backpay claims when he signed the Settlement Agreement and General Release ("Release Agreement") with Respondent. After almost three years of litigation where Avila was a lead plaintiff in a class action lawsuit, the parties entered into the Release Agreement because of the uncertainty of protracted litigation. Res. 17. The Release Agreement was entered into after the parties' counsel extensively negotiated the terms of the Release Agreement. After reviewing the Release Agreement, Avila did not raise any concerns with his attorney regarding the release. Tr. 647. Avila and Respondent agreed to be bound by the terms of the Release Agreement. Thus, the parties voluntarily entered into the agreement and Avila received $5,000 in exchange for signing the agreement. Res. 17. Further, Avila and his counsel were aware of Avila's pending case at the Board and included language releasing claims brought via government agencies, demonstrating they intended to release Avila's backpay claims. Tr. 640; 852; Res. 17. Finally, Respondent has no history of violations or breaches of previous settlement agreements. Since the Release Agreement complies with the terms of the Independent

Stave factors, the Board should approve the Release Agreement and find that Avila is not entitled to backpay. Alternatively, if the Board finds Avila is entitled to backpay, then backpay should be cut off from July 29, 2016, forward.

Alternatively, for the reasons described above, the amount of the Settlement Agreement should be deducted from Respondent's backpay liability because the payments reflect a replacement of lost wages. See American Mfg. Co. of Texas, 167 NLRB 520 (1967) and Baker v. California Shipbuilding Corporation, 73 F. Supp. 322 (S.D. Cal. 1947), supra. This would also apply to the separate settlement checks both Claimants received from Avila's class action lawsuit, which did not require Claimants to sign a separate release agreement in the amounts of $182.52 (Mares) and $248.46 (Avila). These amounts reflected lost wages under Baker, supra.

E. Claimants' Failure to Keep Adequate Records Regarding Their Search for Work Efforts and Interim Earnings Is Tantamount to Concealment and Bars Any Backpay Recovery.

Claimants' failure to keep adequate records regarding their search for work efforts and interim earnings is tantamount to concealment and bars any backpay recovery. Claimants had an affirmative duty to record their search for work efforts and were notified of their obligations. However, Claimants failed to even minimally record their efforts during the backpay period. Claimants waited until 2016 to indicate their search efforts on the NLRB Forms and maintained no other record. Tr. 505; 627. Claimants also failed to make any effort to produce documents to help support their alleged search efforts. Claimants did not produce any business cards from the places to which they allegedly applied, copies of applications they allegedly submitted, copies of ads to which they allegedly responded, etc. Avila did not even print the list of alleged employers he applied to from the Indeed.com website.

As explained above, the ease with which Claimants could have turned to the internet to apply for open job positions cannot be stressed enough, especially on a website like Indeed.com.

Claimants could easily have applied to multiple employers throughout the day simply on their personal cell phones. The fact that Claimants refused to engage in such minimal efforts is astounding.

Additionally, as explained above, both Claimants concealed multiple interim employers during the backpay period. Their failure to keep adequate records was not an oversight and was intentional conduct. Claimants' disregard of their backpay obligations warrants finding that backpay should be cut off.

F. Claimants Are Not Entitled to Expenses for Periods During Which They Did Not Earn Interim Earnings.

Claimants are not entitled to expenses for periods during which they did not earn interim earnings. The Board's ruling in King Scoopers, Inc., 2016 NLRB LEXIS 625 (2016), enforced, King Scoopers, Inc. v. NLRB, 2017 U.S. App. LEXIS 10260 (D.C. Cir., June 9, 2017), was wrongly decided and should be overruled.

Traditionally, the Board has awarded search-for-work related expenses as a setoff from interim earnings, which in turn are subtracted from gross backpay. However, the Board departed from this established approach and expanded the Act's remedies to include search-for-work and interim employment expenses regardless of whether those expenses exceed a discriminatee's interim earnings. See, *e.g.*, D.L. Baker, Inc., 351 NLRB 515, 537, 351 (2007); Aircraft & Helicopter Leasing, 27 NLRB 644, 645 (1976), ("The law is settled that transportation expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination, and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings"); Crossett Lumber Co., 8 NLRB 440, 479-480 (1938).

The Board attempted to justify its decision by alleging the adjustment to its make-whole relief framework was necessary to achieve the goals of the Act. The Board concluded that the pre-King Scoopers remedial framework failed to make claimants truly whole. However, the Board failed to provide a reasoned justification from departing from its well-established precedent. Without a change in the Act or circumstances, there was no legitimate reason to change the Board's well-established law on this issue. See Austin Fire Equip., LLC, 360 NLRB No. 131 slip op. at 5, n. 14 (June 25, 2014), (Board may overrule precedent "to account for changed circumstances or experience applying the law, or to bring the Board's precedent more in line with that of reviewing courts"); see also Browning-Ferris Indus. of Cal., Inc., 362 NLRB No. 186 slip op. at 15 (Aug. 27, 2015), (revisiting joint employer standard because of the change in workplace employment relationships and the increase of the "procurement of employees through staffing and subcontracting arrangements"). Since the Act remained the same at the time of the Board's ruling as when the traditional approach was established, there was no basis to modify the Board's award of interim earnings.

Additionally, to support the expansion, the Board stated that "under the Board's traditional approach, discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed." King Scoopers, Inc., 2016 NLRB LEXIS at 23. However, as Member Miscimarra argued, "[T]he Board's traditional approach to compensating claimants for these expenses makes claimants whole in most cases, and the change adopted by my colleagues will result in greater than make-whole relief in other cases." Id. at *41. Specifically, the dissent claimed that the Board's remedial change "will produce a financial windfall . . . where claimants have interim earnings that equal or exceed the sum of their lost earnings and their employment/search expenses." Id. at *60. Further, "the new

standard does not adequately safeguard against the risk that awarding search-for-work and interim employment expenses, divorced from interim earnings, will tend to produce more protracted Board litigation over such expenses, particularly when such expenses are disproportionately high in comparison to the claimants' lost earnings or interim earnings. . . ."

On the other hand, under the former remedial, when a claimant's recovery of search-for-work expenses was linked to the claimant's interim earnings, the claimant was more likely to focus his job search efforts on locations and jobs in which the claimant was qualified. Offsetting a claimant's search-for-work expenses against the claimant's interim earnings was fair and consistent with the Act's remedial provisions. See Starcon Int'l v. NLRB, 450 F.3d 276, 277-78 (7th Cir. 2006) (Posner, J.) enforcing Starcon, Inc., 344 NLRB 1022 (2005), ("The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal."). Thus, King Scoopers should not be followed and Claimants should not be entitled to expenses for periods during which they did not earn interim earnings.

G. Claimants Are Not Entitled to Any Adverse Tax Consequences Under *Don Chavas* Because CGC Failed to Demonstrate the Extent of Any Adverse Tax Liability Since CGC Failed to Correctly Indicate the Amount of Backpay Owed.

Mares and Avila are not entitled to any adverse tax consequences under Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10 (2014), because CGC failed to demonstrate the extent of any adverse tax consequences. In Don Chavas, the Board explained that the General Counsel had the burden to prove and quantify the extent of any adverse tax liability resulting from a backpay award. Id. at 21.

Here, CGC failed to demonstrate that the backpay calculations indicated in the Compliance Specification were reasonable. Rather, Respondent demonstrated that the backpay formula it

proposed was more accurate. See Section V.J. As such, CGC did not meet her burden under Don Chavas, and Claimants are not entitled to any adverse tax consequences.

H. Interest Should Not Be Calculated on a Compound Basis.

Interest should not be calculated on a compound basis. The Board in Jackson Hospital Corporation d/b/a Kentucky River Medical Center, 356 NLRB 6 (2010), adopted a new policy under which interest on backpay would be compounded on a daily basis, rather than annually or quarterly. The Board erred in doing so; Kentucky River Medical Center was wrongly decided.

Compound interest wrongly penalizes respondents for the sometimes protracted nature of unfair labor practice proceedings. This is especially true given the present case. As discussed below, the Board unduly delayed bringing the backpay case. Further, the Board transferred the case among Regions and multiple compliance officers, causing even further delay. This delay was not caused by Respondent and Respondent should not be penalized for it through the implementation of compound interest on any backpay award granted.

Instead of mandating an across-the-board rule, the Board should have exercised its discretion on a case-by-case basis, as the Federal courts do with respect to both the award of prejudgment interest and how it is calculated in employment cases. Accordingly, Respondent maintains the ALJ should not require that interest be compounded, especially given the lengthy delays. To hold otherwise would unjustly penalize Respondent. As discussed, the NLRA is not a penal statute and windfall remedies—remedies that give "the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal." Starcon Int'l v. NLRB, 450 F.3d 276, 277-78 (7th Cir. 2006) (Posner, J.) enforcing Starcon, Inc., 344 NLRB 1022 (2005).

I. Backpay and Interest Must Be Tolled During the Period Wherein the United States Court of Appeals for the District of Columbia Issued an Independent Stay of the Entire Case, and for the Board's Unreasonable and Excessive Delay in Initiating the Backpay Proceedings.

Backpay and interest must be tolled during the period wherein the United States Court of Appeals for the District of Columbia issued an independent stay of the entire case, holding the entire case in abeyance. Backpay and interest must also be tolled for the Board's unreasonable and excessive delay in initiating the backpay proceedings. Respondent maintains that the principles set in NLRB v. Rutter-Tex Mfg. Co., 396 U.S. 258 (1969) should not be applied to the present situation. While generally "the Board is not required to place the consequences of its own delay" on claimants, the delays experienced in this case are extraordinary and warrant an exception.

In National Labor Relations Board v. SW General, Inc. DBA Southwest Ambulance, 137 S. Ct. 929 (2017), the Supreme Court found the NLRB's Acting General Counsel Lafe Solomon violated the Federal Vacancies Reform Act of 1998 by continuing to serve as Acting NLRB General Counsel after President Barack Obama nominated him to the General Counsel position. Consequently, Respondent maintains the Board lacked authority to act during this time because it lacked a proper quorum. Since the Board chose to act when it lacked a proper quorum, the negative consequences of its improper actions should not be shouldered by Respondent. Thus, backpay should not be awarded because of the Board's inability to act.

Furthermore, due to the above ongoing litigation regarding the Board's ability to act, the United States Court of Appeals for the District of Columbia issued an independent stay of this entire case, holding the entire case in abeyance until the Supreme Court issued its ruling. Given this result was out of the control of Respondent, and caused by the Board, backpay should be tolled

from January 25, 2013, to November 18, 2014, the period during which the case was held in abeyance.

Similarly, the Board's unreasonable and excessive delay in prosecuting this case was not caused by any conduct on the part of Respondent. Quite the contrary, Respondent was cooperative at every part of the backpay compliance. Given Respondent's good-faith cooperative efforts, coupled with the above delays caused by the Board's conduct, backpay should be tolled from when the United States Court of Appeals for the District of Columbia issued its ruling in this case until the filing of the Amended Compliance Specification.

Additionally, Respondent should not be liable for paying interest for the delays caused by the Board. For the same reasons described above, due process and just cause require that interest also be tolled for these same periods.

J. The Compliance Officer's Investigation of Claimants' Backpay Was Inadequate, the Backpay Calculations Are Unreasonable, and Respondent's Proposed Formula Is More Accurate.

As demonstrated above, Steben's investigation in this case was woefully inadequate and, consequently, the backpay calculations are not reasonable. The alternate formula proffered by Respondent is more accurate and should be followed instead. It is CGC's burden to prove by a preponderance of the evidence that the gross backpay formula and amounts are reasonable. Performance Friction Corp., 335 NLRB 1117 (2001); CHM Section 10664.1. CGC did not meet this burden.

Further, the Board has consistently held that the "Judge's task, however, is not simply to approve the General Counsel's formula if he finds it reasonable, but 'to consider whether [that] formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining the amounts due." Laborers Local No. 35 (Betchel Power Corp.), 301 NLRB 1066, 1073 (1991), quoting American

Mfg. Co. of Tex., 167 NLRB 520 (emphasis added by the Board in Laborers Local No. 135). Additionally, "[w]here, as here, the Board is presented with conflicting backpay formula arguments, the Board must determine the 'most accurate' method of determining backpay." Performance Friction Corp., 335 NLRB 1117 (2001) (emphasis in original).

1. Steben Failed to Follow the Investigation Procedures Established by the Board.

The CHM provides that the Compliance Officer should investigate the claimant's search for work, "keeping in mind that the Board and courts have found that the [claimant's] obligation is to make a reasonable effort to find work under existing circumstances." CHM Section 10558.1. However, as described in detail in Section IV.G.1., above, Steben did not follow some of the most essential investigation procedures established by the Board and delineated in the Board's CHM.

Additionally, Steben's backpay formula itself does not follow Board standards. For instance, Steben alleges she did not have comparable wage records from Respondent for the period of June 13, 2014, to February 6, 2015. Tr. 162; GC Ex. 1. Because of this, Steben took an average of what Claimants were earning in 2015 to calculate these missing pay periods. Tr. 163-164. However, the CHM explains that when "normal earnings are temporarily affected by a nonrecurring event, such as an accident or a crisis requiring extra overtime, it would generally be most reasonable to exclude the extraordinary period from the calculation of the average." CMH, Section 10540.1; JT Ex. 1.

Here, Respondent's Controller, Mr. Perfecto, explained that the reason these pay periods were missing was because during the changes to the Perishable Sales Representative position, some individuals were assigned to the position on a temporary basis as relief persons. A relief person is not eligible for commission and generally earns less than a Sales Representative. Thus, their wages were not comparable to the wages earned by the regular Sales Representative, and

therefore Respondent did not include the pay periods when a relief person was assigned to a route, as is prescribed by the CHM. Tr. 844.

Furthermore, it is undisputed Mares and Avila failed to keep adequate records of their search for work efforts. Steben, Mares, and Avila all admitted that the NLRB Forms were not submitted to Claimants until all at once in 2016, and Claimants filled out the NLRB Forms all at once at that time. Tr. 494; 505; 591-592; 627. That is, Claimants did not keep contemporaneous records of their search for work efforts.

Claimants also refused to provide documentation that would accurately demonstrate their interim earnings. For instance, Avila produced only a one-page summary printout of his Social Security earnings. He did not produce any tax return documents or W-2's to Steben. Mares did not produce any tax return documents, either. The CHM specifically notes that a claimant's "failure to cooperate in the investigation and documentation of interim earnings may indicate an effort to conceal interim earnings." CMH Section 10550.4. As uncovered during the course of these proceedings, Claimants concealed earnings from multiple interim employers. At least some of these concealed earnings could have been discovered had Steben followed the procedures prescribed in the CHM.

Clearly, the Board's investigation into Mares' and Avila's backpay recovery was wholly lacking and did not comport with the standards set by the Board. Steben's backpay formula, based on her investigation, is consequently not reasonable. In contrast, Respondent obtained documents from many of Claimants' interim employers and thoroughly questioned Claimants during the Hearing regarding the documents and their efforts to secure interim employment. Respondent uncovered multiple interim employers Claimants concealed from Steben, which Steben discovered at the Hearing during Respondent's cross. See, *e.g.*, Tr. 321 (For example, Steben admitted she

was unaware Mares worked at undisclosed interim employer Nature's Own prior to his work at Pacific Foods). Based on the foregoing, the Board's backpay formula should be disregarded and Respondent's formula followed instead since it is more accurate. Atlantic Veal & Lamb, Inc., 355 NLRB 228, fn. 5 (2010).

2. Steben's Mileage Expense Calculations Do Not Account for Holidays, Vacations, Leaves of Absence, Etc., and Since Claimants Failed to Produce Documents Regarding Their Attendance, Mileage Expenses Should Not Be Awarded.

The Compliance Specification does not account for holidays, vacations, sick days, etc., and because Claimants failed to produce documents demonstrating Company holidays, their vacation days, etc., mileage expenses should not be awarded. Alternatively, mileage must be reduced to take into account these absences when Claimants did not incur interim expenses. Mastro Plastics Corp., 136 NLRB 1342, 1349 (1962), enforced in relevant part, 345 F.2d 170 (2d Cir. 1965).

3. Because Respondent's Backpay Formula Is More Accurate, Respondent's Formula Should Be Used, Which Finds That Neither Mares nor Avila Are Owed Any Backpay.

Since Respondent's backpay formula is more accurate than the formula proposed by the Board, the ALJ should adopt Respondent's formula. As described in detail above, Respondent's formula takes into consideration the Claimants' alleged interim earnings (obtained through more accurate sources than those submitted to the Board), concealed earnings, periods of willful idleness, leaves, alleged expenses, and received settlement funds. Using this information, and adjusting Respondent's original formula as set forth in its Amended Answer to the Amended Compliance Specification to account for the new facts discovered at the Hearing, Respondent proposes the following formula:

Claimant: **Alfonso Mares**

Case Nos.: 21-CA-039581; 21-CA-039609
Backpay Period: June 2, 2010 – October 25, 2010

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2010	2	4,289.00	0.00	0.00	4,289.00
2010	3	16,008.00	Concealed earnings[3]	0.00	0.00
2010	4	2,668.00	Concealed earnings	0.00	0.00
2011	1	16,008	6,870.00 + Concealed earnings [4]	0.00[5]	0.00
2011	2	18,676	6,870.00 + Concealed earnings	0.00	0.00
2011	3	15,028	6,870.00 + Concealed earnings	0.00	0.00
2011	4	15,246	6,870.00 + Concealed earnings	0.00	0.00

[3] Respondent maintains that Mares worked for Nature's Own from August 17, 2010, until January 17, 2011, when Mares began work for Pacific Foods. Res. 10 and 21. Because Mares concealed his employment with and interim earnings from Nature's Own, Respondent asserts that backpay should be cut off for the entire backpay period. Alternatively, Respondent asserts that backpay be tolled for this period.

[4] Respondent asserts the interim earnings listed on this table 1 are at least the amounts shown, but are not limited to these amounts. In fact, Respondent maintains that interim earnings are higher than the amounts listed because Mares concealed interim earnings from his trucking company and from his tenant in the form of monthly rental payments (estimated at $29,880 for the backpay period). Since it cannot be determined which quarters to attribute earnings to from his trucking company, backpay must be denied for the backpay period. Additionally, since Mares concealed the additional income received from monthly rental payments received throughout the backpay period, backpay must be denied for the entire period.

[5] Respondent alleges that because neither Mares nor the Compliance Officer reasonably calculated expenses incurred by Mares, no expenses are due Mares. Furthermore, because Mares concealed interim earnings throughout the backpay period, no backpay is owed, including no expenses.

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2012	1	14,623	8,811.00 + Concealed earnings	0.00	0.00
2012	2	12,534	8,811.00 + Concealed earnings	0.00	0.00
2012	3	14,623	8,811.00 + Concealed earnings	0.00	0.00
2012	4	12,534	8,811.00 + Concealed earnings	0.00	0.00
2013	1	10,892	9,573.00 + Concealed earnings	0.00	0.00
2013	2	9,336	9,573.00 + Concealed earnings	0.00	0.00
2013	3	10,892	9,573.00 + Concealed earnings	0.00	0.00
2013	4	9,336	9,573.00 + Concealed earnings	0.00	0.00
2014	1	11,767	10,953.00 + Concealed earnings	0.00	0.00
2014	2	10,086	10,953.00 + Concealed earnings	0.00	0.00

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2014	3	11,767	10,953.00 + Concealed earnings	0.00	0.00
2014	4	10,086	10,953.00 + Concealed earnings	0.00	0.00
2015	1	12,446	10,494.00 + Concealed earnings	0.00	0.00
2015	2	10,668	10,494.00 + Concealed earnings	0.00	0.00
2015	3	12,446	10,494.00 + Concealed earnings	0.00	0.00
2015	4	10,668	10,494.00 + Concealed earnings	0.00	0.00
2016	1	12,481	12,208.00 + Concealed earnings	0.00	0.00
2016	2	10,698	12,208.00 + Concealed earnings	0.00	0.00
2016	3	8,202	6,976.00 + Concealed earnings	0.00	0.00

Total Net Backpay for 4.75-month backpay period:	0.00 (Concealed earnings)	0.00[6]	0.00	0.00 (Concealed earnings)
Total Expenses during four month backpay period:				0.00
Funds Disbursed to Mares per Settlement Agreement with Respondent[7]:				25,000.00
Funds Disbursed to Mares per *Avila/Martinez* Class Action Lawsuits[8]:				202.40
Total Alleged Net Backpay Owed:				-25,202.40 (Respondent has no backpay liability)[9]

Claimant: **Javier Avila**

Case Nos.: 21-CA-039581; 21-CA-039609
Backpay Period: December 2, 2010 – April 25, 2011

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2010	4	2,563.00	0.00[10] + Concealed earnings	0.00	2,563.00

[6] Respondent asserts the backpay period for Mares is June 2, 2010, to October 25, 2010, the period during which, if Mares had engaged in a reasonable search, he would have found comparable work. Respondent further asserts Mares was employed during this time and did earn interim earnings from Nature's Own, but that Mares concealed this from the Board. Backpay therefore must be denied.

[7] Backpay ends starting when Mares entered into the C&R with Respondent, releasing all his employment claims because he had no intention of returning to work with Respondent.

[8] Although Respondent alleges Mares is not entitled to backpay, any alleged backpay should be cut off, or alternatively offset, by the amount of money Mares received as a class member in the Javier Avila v. Marquez Brothers Enterprises, Inc. and Omar Martinez v. Marquez Brothers Enterprises, Inc. class action lawsuits.

[9] Or in the alternative, no more than 4.75 months because that is the time during which, if Mares had engaged in a reasonable search for work, he would have secured comparable interim employment. However, this amount should be offset by the legal fees incurred by Respondent in enforcing its subpoena due to Mares' abuse of the Board process.

[10] Respondent refutes Avila's claim that he did not have interim earnings during the time period December 2, 2010, to April 25, 2011. As discussed above, Avila indicated he was a promoter for the band El Conjunto Rebelde, earning between $60,000 to $75,000 per year. Avila also concealed earnings from his work at Avila's Pressure Washer, which cannot be separately ascertained for any particular quarters. As such, no backpay is owed.

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2011	1	10,338.00	0.00 + Concealed earnings	0.00	10,338.00
2011	2	12,061.00	0.00 + Concealed earnings	0.00	12,061.00
2011	3	10,396	0.00 + Concealed earnings	0.00	0.00
2011	4	12,264	Concealed Earnings[11]	0.00	0.00
2012	1	14,294	5,038.00[12] + Concealed earnings	0.00[13]	0.00
2012	2	12,252	5,038.00 + Concealed earnings	0.00	0.00
2012	3	14,294	5,038.00	0.00	0.00
2012	4	12,252	5,038.00 + Concealed earnings	0.00	0.00
2013	1	16,856	11,340.00[14] + Concealed earnings	0.00	0.00

[11] Avila concealed his interim employment with, and earnings from, Macy's. Backpay must be tolled for this quarter.
[12] Respondent asserts the interim earnings listed on this table 2 are at least the amounts shown, but are not limited to these amounts.
[13] Respondent alleges that because neither Avila nor the Compliance Officer reasonably calculated expenses incurred by Avila, no expenses are due Avila. Furthermore, because Avila concealed interim earnings throughout the backpay period, no backpay is owed, including no expenses.
[14] Should it be determined backpay is owed beyond April 25, 2011, which Respondent denies, backpay must be tolled for when Avila was on baby-bonding leave during February 2013 until April 2013.

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2013	2	14,448	11,340.00 + Concealed earnings	0.00	0.00
2013	3	16,856	11,340.00 + Concealed earnings	0.00	0.00
2013	4	14,448	11,340.00 + Concealed earnings	0.00	0.00
2014	1	14,847	8,586.00 + Concealed earnings	0.00	0.00
2014	2	12,726	8,586.00 + Concealed earnings	0.00	0.00
2014	3	14,847	8,586.00 + Concealed earnings	0.00	0.00
2014	4	12,726	8,586.00[15] + Concealed earnings	0.00	0.00
2015	1	15,232	3,098.00 + Concealed earnings	0.00	0.00

[15] Backpay should be cut off from when Avila unreasonably abandoned his job with AT&T. Alternatively, should it be found that backpay is owed for this time period, Avila's earnings from AT&T must be attributed to all quarters until Avila secured a better paying job.

Year	Quarter	Gross Backpay	Quarter Interim Earnings	Interim Expenses	Net Backpay
2015	2	13,056	3,098.00 + Concealed earnings	0.00	0.00
2015	3	15,232	14,300.00 + Concealed earnings	0.00	0.00
2015	4	13,056	14,3009.00 + Concealed earnings	0.00	0.00
2016	1	14,420	14,300.00 + Concealed earnings	0.00	0.00
2016	2	12,360	14,300.00 + Concealed earnings	0.00	0.00
2016	3	10,300	14,300.00 + Concealed earnings	0.00	0.00

Total Net Backpay for four month backpay period:	24,962.00 + Concealed earnings	0.00[16]	0.00	0.00 (Concealed earnings)
Total Expenses during four month backpay period:				0.00
Funds Disbursed to Avila per General				5,000.00

[16] Respondent asserts the backpay period for Avila is December 2, 2010, to April 2, 2011. Respondent refutes Avila's claim that he did not have interim earnings during this time. Alternatively, should the Board determine the backpay period ends after October 2, 2010, any interim earnings received by Avila from any source during the backpay period, including what is listed above, must offset against any alleged backpay owed by Respondent.

Release Agreement with Respondent[17]:				
Funds Disbursed to Avila per *Avila/Martinez* Class Action Lawsuits[18]:				276.18
Total Alleged Net Backpay Owed:				0.00 (Concealed Earnings[19])

K. Respondent Respectfully Requests the ALJ to Order Claimants to Pay Its Legal Fees Relating to the Delays Caused by Claimants' Willful Refusal to Fully Comply with Subpoenas.

Respondent respectfully requests the ALJ to order Claimants to pay its legal fees relating to the delays caused by Claimants' willful refusal to fully comply with the subpoenas. In 675 W. End Owners Corp., 345 NLRB 324 (2005), the Board adopted the Judge's finding that Respondent's conduct in disobeying the Judge's instructions that a revoked subpoena may not be served again and that issuance of a subpoena after the close of the hearing was an abuse of Board process. The Board further found that Respondent's actions regarding the subpoenas amounted to "bad faith in the conduct of the litigation," and the Board agreed with Judge's recommendation that a hearing be held to determine litigation costs owed to the Union and the General Counsel. Id. at 326. The Board cited Service Employees District 1199 (Staten Island University Hospital), 339 NLRB 1059, fn. 2 (2003), (rejecting charging party's request that the Board order the respondent to pay its legal fees but noting that the Board has the power to do so).

[17] Backpay ends from when Avila entered into the Settlement and Release Agreement with Respondent, releasing all his claims against Respondent, including his backpay claims.

[18] Although Respondent alleges Avila is not entitled to backpay, any alleged backpay should be cut off, or alternatively offset, by the amount of money Avila received as a class member in the Javier Avila v. Marquez Brothers Enterprises, Inc. and Omar Martinez v. Marquez Brothers Enterprises, Inc. class action lawsuits.

[19] Or in the alternative, no more than 4.75 months because that is the time during which, if Avila had engaged in a reasonable search for work, he would have secured comparable interim employment. However, this amount should be offset by the legal fees incurred by Respondent in enforcing its subpoena due to Avila's abuse of the Board process.

Here, Claimants engaged in bad-faith conduct regarding Respondent's subpoenas throughout the course of these proceedings. Claimants refused to fully comply with Respondent's subpoenas, willfully withholding responsive documents that were damaging to their case. Claimants' conduct is even more outrageous given the fact CGC acted as their counsel throughout the Hearing in repeatedly providing advice relating to Respondent's subpoenas. Even with CGC's ongoing counsel, Claimants refused to fully comply with the subpoenas and caused multiple delays and costs.

For instance, because of Claimants' failure to engage in a good-faith effort to gather responsive documents to produce on the first day of the Hearing, the Hearing concluded that morning without any testimony being heard. Claimants also went to great lengths to deny that their job duties with Respondent involved sales. However, when forced (under threat of sanctions) to produce responsive documents, the reason for concealment became clear: resumes from both Claimants listed experience and sales positions. Nonetheless, Respondent was forced to spend excessive time at the Hearing meticulously questioning each Claimant regarding their sales job duties at Respondent and other employers.

Notably, Respondent was forced to engage in repeated and costly motion work because of Claimants' conduct in concealing documents and refusing to comply with Respondent's subpoenas. Given that it has been indisputably established that Claimants were represented for all intents and purposes related to Respondent's subpoenas, and still engaged in such gamesmanship, Respondent respectfully requests that Claimants be required to pay Respondent's legal fees involved in enforcing its subpoenas and engaging in unnecessary and lengthy questioning relating to Claimants' sales job duties while employed with Respondent. As demonstrated above, Board precedent permits such a remedy when a party engages in such extreme abuses of Board process.

675 W. End Owners Corp., 345 NLRB at 326; Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190, 1193 (2001), (Board has remedial authority to award litigation costs when a party exhibits bad faith in the conduct of the litigation), enfd. No. 01-1513, 2003 WL 880990 (D.C. Cir. Feb. 14, 2003).

VI. CONCLUSION.

WHEREFORE, for the foregoing reasons, Respondents respectfully request that backpay be denied in whole for each Claimant.

Respectfully submitted,

Dated: May 2, 2018

JACKSON LEWIS P.C.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I caused the foregoing *Respondent's Post Hearing Brief* to be filed with the Division of Judges of the National Labor Relations Board, using the CM/ECF system.

I further hereby certify that on May 2, 2018, I served a copy of *Respondent's Post Hearing Brief* via electronic mail upon the following:

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